













An  
Essay on military Law

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AN  
ESSAY



ON  
MILITARY LAW, &c.

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INTRODUCTION.

**T**HE foundation of the Military or <sup>Foundation of</sup> Martial Law, is that <sup>Martial Law</sup> which is common to all law whatever—the necessity of things. As, from the condition of human nature, no state can subsist without occasional warfare, it was an early discovery in political œconomy, that a body of professional soldiers is much better fitted for attaining the ends both of security and defence, and the achieving of ~~conquests (which a na-~~

cessary policy at times must justify) than those temporary forces which are raised by occasionally embodying and arming a portion of the citizens.\* War is a science which is not to be attained in any measure of perfection, without a regular initiation in its elements, and a long and uninterrupted exercise of its duties. Moreover, as there is in all liberal professions an *esprit du corps*, or general character of the body, which is known to have the most admirable effect in cherishing the laudable, and in correcting the faulty or degenerate temperaments of the individuals which compose it, the principle of honour, which is the general character of the military order of citizens, could not have had its full operation, unless the military vocation had stood discriminated from all others, and ranked as a profession which gives to its members an appropriate character and name in civil society.

Expediency, therefore, and the wisest

\* This subject is well illustrated by Dr. Smith, in his Essay on the Wealth of Nations, book v. ch. 1.

policy, having rendered the military condition a regular profession in all civilized nations, it became necessary that this body of men, who, from their number, were capable of becoming either a powerful instrument of good, or a formidable engine of evil, should be regulated by certain laws, exclusively adapted and proper to their state. It was requisite that they should act with regularity, with promptitude, and unanimity : and for that purpose it was essentially necessary that they should feel themselves perpetually under the strictest subordination, and yield the most perfect and absolute obedience to the command of their leaders. For this purpose, a sacrifice of a greater portion of the personal liberty of individuals is necessary in the profession of a soldier, than in any other of the employments of civil life ; for without that sacrifice the army could not for a moment be kept together. Necessity, therefore, requires that certain restraints should be imposed on all the ranks of men who compose the military force of

the state, which are foreign to the condition of other citizens. But when it is considered for what a noble end those sacrifices are made; no less than the security, peace, and welfare of the whole community; and that in themselves they infringe not on any one essential ingredient of rational liberty, or the most comfortable enjoyment of life; when it is considered that those trivial restraints are most amply compensated by the wise, humane, and bountiful provisions that are made for the soldier, after he is released with honour from the fatigues of his profession, and by the immunities and privileges he enjoys in that title, above all others of his fellow-subjects; there is no man possessing a liberal

\* “ By Stat. 43. Eliz. c. 3. a weekly allowance is to be raised  
 “ in every county for the relief of soldiers that are sick, hurt,  
 “ and maimed. The Royal Hospital at Chelsea is instituted  
 “ for the support of such as are worn out in their duty. Offi-  
 “ cers and soldiers that have been in the King’s service, are,  
 “ by several statutes enacted at the close of several wars, at  
 “ liberty to use any trade or occupation they are fit for, in any  
 “ town in the kingdom (except the two Universities) notwith-  
 “ standing any statute, custom, or charter to the contrary.

And

liberal or well constituted mind, who will complain of the hardships of the military profession, far less arraign its peculiar regulations of inexpediency or injustice.

The chief point in which the condition of a soldier differs from that of another citizen with respect to personal liberty is, that his professional conduct being regulated by the Articles of War, it is in the power of the Sovereign, and entirely at his discretion, to enact such Articles of War as may to him seem most expedient for the government of the army, over which he is in that respect exclusively the legislator. And this power it is alledged, in the hands of an arbitrary prince, might reduce the condition of a soldier to a state of the most abject servitude. But let it be considered, that the Sovereign of Great Britain is in no sense to be regarded as an

"And soldiers on Military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expences which the law requires in other cases." Blackstone, b 1. c. 13.



arbitrary prince or absolute monarch. His powers and prerogatives are most specially defined, and so wisely limited by the laws and constitution of the realm, that no prince who occupies the throne of these kingdoms, be his individual character and disposition ever so prone to tyranny, can materially affect or abridge the liberties of any class of his subjects. Under the constitution of Great Britain, theoretically speaking, there is no standing army; for although in reality the army is not annually disbanded, yet the annual consent of parliament is required to keep it in existence. It is therefore, in the nature of things, impossible, that any arbitrary enactments, tending to degrade the condition or abridge the liberties of the soldiery, could have a longer duration than a year. Moreover, the Mutiny-act, by which the King is authorised to frame Articles of War, and which in fact is the Code of military law, is the operation of Parliament, and not of the Sovereign. It undergoes an annual revision in both houses;

houses ; it is subject to alteration and amendment by the wisdom of the legislature ; and thus, by the very limited term of its duration, and frequency of its renewal, it is more truly and immediately framed by the people itself, than any other of the existing statutes of the realm.

It is true,\* that by the Mutiny-act\*, a power is granted to the Sovereign, “ of forming Articles of War for the better government of his Majesty’s forces, and of constituting Courts-martial, with power to try, hear, and determine any crimes, or offences by such Articles of War, and inflict such penalties as the articles direct.” But even this extensive power has its limits ; and these are of such a nature as to bar every possible exertion of a tyrannic authority, or arbitrary infringement of the valuable rights of the subject. For while the right of framing *Articles of War*, and inflicting penalties, is declared to belong to the Sovereign, it is at the same

\* Sect. 55, & 56.

time provided\*, “ That no officer or soldier shall, by such Articles of war, be subjected to any punishment extending to *life or limb*, for any crime which is not expressed to be so punishable by the Mutiny-act.” The penalties, therefore, which it is competent for the Sovereign to decree by his own authority, must at the worst be of a very slight and subordinate nature, and calculated merely for the enforcement of good discipline; since the greater crimes, and their appropriate punishments, are defined and regulated by the Mutiny-act, which, as already said, is the operation, not of the Sovereign *per se*, but of the united branches of the legislature; and the penalty of death cannot be inflicted by any articles of war, “ unless for such crimes as are expressed to be so punishable by the Mutiny-act.

Besides this, when it is considered that even those subordinate penalties, which it is competent for the Sovereign to enact by Articles of war, or other regulations for the

\* Sect. 57.

## ON MILITARY LAW.

army, cannot be inflicted but through the medium of a court-martial, which has the essential characteristics of a jury; and is in fact a trial of the subject by his peers; we shall immediately be convinced, that this power of the Crown, which has furnished much matter of intemperate declamation, to writers tinctured with republican prejudices, can never be exercised, under our excellent constitution, to the injury of the subject, or the abridgment of any of the valuable rights of that honourable class of men who compose the military force of the state.

The only other particular in which the condition of a soldier is in any shape different from that of other citizens with respect to personal liberty, is what is indeed essential and inherent in the very nature of his profession; he is under authority; he is not his own master, or, as the lawyers say, *aut juris*; he can neither dispose of his own time, nor regulate at pleasure his own actions; and having once embraced the military profession, he cannot,

not, when he chuses, divest himself of that character; but must, in all matters connected with his vocation, be subservient to the commands of his Sovereign, and under him to the authority of those officers who are his superiors.

But to complain of these peculiarities of the military profession, either as being substantial grievances, or as ~~restraints~~ which derogate in any sense from the dignity of our nature, is a mark of the most extreme folly and perversion of understanding. Either the army must be linked together in all its parts by the most absolute obedience and submission of the several ranks to their superior officers, or it must cease to exist. For as its function is to act as a regular and perfect machine, of which all the parts, in their mutual dependance on each other, tend to produce one great, uniform, and simple effect; it is evident that such effect can never be accomplished, unless, like the mechanical structure of a time-piece, all those various parts are in due connection, each acted upon by a superior.

rior power, and in its turn regulating its inferior, while the whole derives its motion from one great and ultimate moving power. If a soldier complains of the restraints of his vocation, he throws no impeachment on his profession, but arraigns himself of folly, who did not perceive that those restraints are essential to its condition.

These remarks I mean not to address to our modern advocates for the *natural and imprescriptible rights of man*, those benevolent apostles of liberty, who, in their zeal for the happiness of the whole human race, overlook and utterly disregard all the inferior ties of ordinary patriotism; the predilection for one particular country above all others, the respect for its laws, the duty of obedience to its government, the partial affection for its constitution. Of this enlightened species of philanthropy, it is an essential doctrine, that the military condition, which hitherto, in every civilized nation, has been held as honourable, dignified, and manly, is a state of the most unjust, intolerable, and debasing servitude.

But

But if, with these generous advocates in the cause of humanity, I waive all argument, (and that for the best of reasons, because we hold no common principles of reasoning on which the argument could be conducted), it is with real concern that I am compelled to notice, and in so doing, widely to dissent from the opinions of authors of a very different class, indeed from those above alluded to; of authors who, not only on the score of profound abilities, and extensive knowledge of the laws and constitution of their country, but of real philanthropy, are, from the general scope and tenor of their writings, entitled to the highest regard and veneration of their fellow-citizens. With what pain must every well-wisher to his country, or (what is a synonymous term) every friend to its excellent constitution, peruse the following opinions of Sir William Blackstone, drawn, as I shall immediately shew, from false principles, and penned in an unguarded moment, and at a period of time long antecedent to that fatal exemplification which

our days have witnessed, of the pernicious tendency of all such doctrines.

"Martial law," says that author, "which is built upon no settled principles, but is entirely arbitrary in its decisions, as Sir Matthew Hale observes, is truth and reality no law, but something indulged rather than allowed as law. The necessity of order and discipline in an army, is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the King's Courts are open for all persons to receive justice according to the laws of the land."

He who wishes to form rational and sound opinions either in philosophy, in politics, or indeed in any science, must emancipate himself from all slavish subjection to the authority of great names. Sir Matthew Hale and Sir William Blackstone, men profoundly versed in the *Civil laws* of their country, which they have most ably

\* Blackst. Comm. b. 1 c. 13.

† Hist. C. E. c. 2.

explained.



explained and illustrated, have but incidentally touched on the subject of *Martial Law*, of which they had no call to propound the doctrines, and therefore were at no pains to investigate the principles. Had those great masters of civil jurisprudence bestowed the same attention on this subject that they have exercised on those which fell immediately within their own department, we should have met with no such rash and ill-founded positions as those which I have above quoted.

In fact, the whole of the foregoing paragraph of Sir William Blackstone teems with error, with inconsistency, and with misrepresentation. The principles of Military law are as certain, determinate, and immutable, as the principles are of the common and statutory law, which regulate the civil classes of society. The author himself, in the very next sentence, assigns the great principle on which all Military law is built, and which is coeval with, and essential to the existence of civil society; the necessity of order and discipline

cipline in an army. The Martial Law is a code or body of regulations for the proper maintenance of that order and discipline, of which the fundamental principles are, a due obedience of the several ranks to their proper officers, a subordination of each rank to their superiors, and the subjection of the whole to certain rules of discipline, essential to their acting with the union and energy of an organized body.

The Mutiny-act and Articles of War which contain these rules of discipline, are framed, as we have already observed, by the joint will and co-operation of the two houses of parliament and of the Sovereign, the legislative and executive powers of the state; and the observance of these rules is enforced, either by plain, specific, and fixed penalties appropriated to each offence, where the crime is of a positive nature, admitting of no gradations; or the offence is left, in certain cases where it admits of degrees of criminality, to the decision of a jury, in other words, of a court martial. With what justice or propriety the military

tary law can therefore be said, in the words of Judge Blackstone, to be “ entirely arbitrary in its decisions,” every impartial mind will determine.

But this law, according to the same author, which, being built on no settled principles, receives its countenance from the necessity of maintaining order and discipline in an army, “ ought therefore not to be permitted in time of peace :” a most extraordinary conclusion indeed, and of which it is not a little difficult to perceive the connection with its premises. To justify this conclusion, the author ought previously to have shewn, that the existence of an army in time of peace is a thing in itself unnecessary and illegal ; for while an army exists, it must be kept under order and discipline. But the necessity of some permanent military force at all times, for security’s sake, is self-evident ; and the *Bill of Rights* itself declares a standing army in time of peace, if with the consent of parliament, to be legal and constitutional. Unless, therefore, the author could have

have shewn, that the same army which in time of war requires the enforcement of a code of laws, and appropriate penalties for the breach of them, is in time of peace to subsist by some magical bond and connection of its parts, and is to be perfectly trained and regulated without any settled rules of discipline; we must, however unwillingly, pronounce, that the position contained in the above sentence is in the last degree incongruous and absurd.

Nor is the last clause of the sentence above quoted one whit more consonant to reason or just argument. Military or martial law, says this author, ought not to be permitted in time of peace, because “the King’s courts are open for all persons to receive justice according to the laws of the land.” Can the laws of the land, that is the common and statute law, administered in the King’s ordinary courts, apply to, or take cognizance of breaches of military discipline? Are the civil courts competent to the trial of desertion, mutiny, disobedience of orders, insolence

to superior officers, breach of arrest, false musters, &c. ? Are these tribunals vested with the power of punishing cowardice ? Or does the common and statutory law reach the nameless and undefinable offences arising from that turpitude of conduct in the ordinary occurrences of life, which the military code most emphatically describes as “unbecoming the character of an officer or a gentleman ?” Yet without some power which is adequate to the restraint and correction of all those deviations from the duty of a soldier, the army could not exist for a single day\*.

In

\* It is indeed true, that, in compliance with the jealous spirit of British subjects, with regard to every thing that touches civil liberty, the preamble of the Mutiny-act seems to give some countenance to the idea of a suspension of Military Law in time of peace, in the following clause, “Whereas no man can be forejudged of life or limb, or subjected *in time of peace* to any kind of punishment within this realm by Martial Law, or in any other manner than by the judgment of his peers, and according to the known and established laws of the realm.” It is proper however to observe, that these words, *in time of peace*, are in reality an innovation, which appears to have been first introduced into the Mutiny-act, passed 1 Ann. 2 sess. c. 16. without warrant from any preceding statutes in the whole series downwards from *Magna*

*Charta*

In a similar spirit of false reasoning, the same respectable author expresses his

*Charta.* The first Mutiny-act passed in the reign of King William bears no such words; but contains simply a protest in favour of the subjects in general, that they cannot be subjected to any punishment by Martial Law, or in any other manner than by the common laws of the realm. The introduction of these words was superfluous, where Martial Law was utterly disclaimed as binding the subjects in general; and their insertion tended in fact to weaken the general proposition, as it might be thence argued, that it was only in time of peace that its general obligation was declared to be suspended; whereas in reality the legislature meant to assert the broad maxim of the inefficacy of Martial Law at all times to bind the common mass of the people, who were declared to be no otherwise subject to punishment, than according to the common laws of the realm. But this fundamental maxim or rule being laid down as holding true with respect to the subject in general, the Mutiny-act proceeds immediately to ordain a positive exception in the case of military persons, in the following words. “ Yet  
“ nevertheless, it being requisite for the retaining all the be-  
“ fore mentioned forces in their duty, that an exact discipline  
“ be observed, and that soldiers who shall mutiny or stir up se-  
“ dition, or shall desert his Majesty’s service, be brought to a  
“ more exemplary and speedy punishment than the usual form  
“ of the law will allow; Be it therefore enacted.” And then follow the several enactments and provisions for that necessary purpose.—It is plain, therefore, that no argument whatever can be drawn from the style or tenor of the Mutiny-act, in support of the proposition, that the Military Law, admitted to be binding in time of war, should cease to have that obligation in time of peace.

regret, that the soldiery “should be reduced to a state of servitude in the midst of a nation of freemen; for Sir Edward Coke informs us, that it is one of the genuine marks of servitude, to have the law which is our rule of action, either concealed or precarious: *Misera est servitus, ubi jus est vagum aut incognitum.*” But where, it must be asked, is the country here alluded to, where the military law is either vague and precarious, or unknown? Surely it is not Britain. Can that law be termed *vague* or *precarious*, which consists but of a very few simple regulations, deliberately enacted by the whole branches of the legislature; renewed, it is true, in their binding obligation from year to year, but scarcely undergoing even the most trivial alteration? Can that law be termed concealed or *unknown*, which receives not only the ordinary promulgation of all other acts of the legislature, by its entry in the printed statute-book, but which must, by positive regulation, be repeatedly inculcated on the memory of every individual of

of the military profession?—For the Articles of war, the substance of the military code, must be read at the head of every regiment once every two months. How then can it be with justice asserted, that this law is either concealed or precarious? Such positions are equally absurd as they are mischievous. It gives me pain to make these remarks on a few particular notions of an author, for whose opinions on the general doctrines of the law, I have, in common with the world, the highest respect. But I plead here the cause of the Military profession, which is injured and degraded, through actual ignorance of the nature of its establishment and laws. To the truth of Sir Edward Coke's general maxim, all men must subscribe: the conclusion flows necessarily from its premises: But if those premises are false when predicated of the British government as now existing, the conclusion, with respect to it, must fall of course. That the summary mode of execution, which was termed *The Martial law* in former periods of



our history, (when the prerogative of the Crown seemed to have no determined limit), deserved all those characters of tyranny which have been assigned to it by Hale and Coke, we may most readily acknowledge: But to the Martial law, as it exists at present, under an improved and settled constitution, and a clearly defined prerogative of the Crown, these characters have not the most distant applicability. It was therefore a palpable oversight (but in a matter of this high consequence not easily excusable) in our great commentator on the laws of England, to have applied the description of an antiquated and justly exploded tyranny, to a well regulated, moderate, and humane system, such as the present Law-military of this country: a system as different from the former, as the constitution of England is at this day from the actual government under the House of Tudor. “ Martial law, (says a high authority), such as it is described by Hale, “ and *such also as it is marked by Sir William Blackstone*, does not exist in England “ at

“*at all.\**” The modern British soldier, enjoying, in common with his fellow-subjects,

\* In Trinity-term, 1792, a motion was made in the court of Common Pleas, in behalf of Serjeant George Samuel Grant, for a prohibition against the execution of the sentence of a General Court-martial, by which he was condemned to receive a thousand lashes, for the crime of having been instrumental in the inlisting for the service of the East-India Company two drummers, knowing them at the same time to belong to the Foot-guards. The case was argued at great length; and the late Lord Chancellor, then Lord Chief Justice of the Common Pleas, in delivering the opinion of the Court, thus pointedly and strongly expressed his sentiments, in reprobation of the false ideas respecting the Military law, as drawn from ancient writers, or the practices of ancient times, and applied to the present; most accurately marking the distinction between Martial law properly so called, and so described by those writers, and that Military law which regulates the British army. “In the preliminary observations on the case, the learned counsel (said Lord Loughborough) went at length into the history of those abuses that in ancient times had prevailed; and it helped me to an observation, that Martial law, such as it is described by Hale, and such also as it is marked by Sir William Blackstone, *does not exist in England at all*. Where Martial law is established, and prevails in any country, it is of a totally different nature from that which by inaccuracy is called Martial law, because the decision is by a Court-martial, but which bears no affinity to that which was (when it was attempted to be exercised in the kingdom) contrary to the constitution, and has been for a century

jects, every benefit of the laws of his country, is bound by the Military Code, solely

“ century exploded. Where Martial law prevails, the authority under which it is exercised claims a jurisdiction over all Military persons in all circumstances: even their debts are subject to enquiry by a military authority: and every species of offence committed by any person who appertains to the army, is tried, not by the civil judicature, but by the judicature of the regiment or corps to which he belongs. It extends also to a great variety of cases not relating to the discipline of the army, but relative to that state which subsists by Military power; as plots against the Sovereign, intelligence to the enemy, which are all considered as cases within the cognizance of the Military authority. In the reign of King William, there was a conspiracy against his person in Holland:—the persons guilty of that conspiracy were tried by a council of officers. There was also a conspiracy against his person in England; but the conspirators were tried by the *Common law*. Within a very recent period the incendiaries attempting to set fire to the docks at Portsmouth, were tried by the *Common laws*. The delinquencies of soldiers are not triable here, as in most countries in Europe, by *Martial law*: but generally where they are offenders against the civil peace, they are tried by the *Common-law courts*. Therefore it is totally inaccurate to state *Martial law* as having any place whatever within the realm of Great Britain. But, by the providence and wisdom of Parliament, an army is established in this country, which it is necessary to keep up; the establishment being fixed by the authority of the legislature. It is an indispensable requisite of

solely to the observance of the peculiar duties of his profession ; a Code which is simple

“ of the establishment of an army, that there should be order  
 “ and discipline kept up in that army, and that the persons  
 “ who compose it should, for all offences in their military ca-  
 “ pacity, be subject to a trial by their officers. This has in-  
 “ duced the absolute necessity of a Mutiny-act accompanying  
 “ the army ; and it has happened at different periods of the  
 “ government, that there has been a strong opposition to the  
 “ establishment of the army ; but the army being established  
 “ and voted, that led to the establishment of a Mutiny-act. It  
 “ is one object of that act, to provide for the army ; but there  
 “ is a much greater cause for the existence of a Mutiny-act,  
 “ and that is, the preservation of the peace and safety of the  
 “ kingdom : for there is nothing so dangerous to the civil esta-  
 “ blishment of a state, as a licentious and undisciplined army.  
 “ The object of the Mutiny-act, therefore, is to create a court  
 “ invested with authority to try those who are a part of the  
 “ army, in all their different descriptions ; and the object of the  
 “ trial is limited to breaches of military duty. Even that ex-  
 “ tensive power granted by the legislature to his Majesty to  
 “ make Articles of war, is limited to the making of Articles  
 “ for the better government of his forces,” and they can ex-  
 “ tend to no other cases than such as are thought necessary  
 “ for the regularity and due composition of the army.  
 “ Breaches of military duty are in many instances strictly de-  
 “ fined ; in all cases where a capital punishment is to be in-  
 “ flicted. In other instances, where the degree of offence may  
 “ vary exceedingly, it may be necessary to give discretion  
 “ with regard to the punishment ; and in some cases it is im-  
 “ possible

simple in itself, reasonable in its enactments, easy in all its obligations; level to the meanest understanding, and more effectually promulgated, and better known than any of the ordinary statute laws of the realm. He complains not himself of the hardships of his lot; he honours his own vocation, and justly accounts it deserving of the honour and respect of others. But with much reason he complains of those who studiously labour to degrade his condition, by that officious regret, which, while it seems to spring from a desire for the melioration of the military state, tends, by its effects on the minds of the weak and ignorant, to dissolve the fundamental and necessary obligations by which alone it can subsist.

The author of the following Treatise trusts, that one result of his undertaking, (though he does not propose it as his prin-

“possible more strictly to mark the crime, than to call it a  
 “neglect of discipline.” I have no need of apology for the  
 length of this quotation, containing an opinion of such weight,  
 on so important a subject.

cipal

cial end) shall be a complete disproof of all such false and injurious opinions regarding the military condition and its laws. But for that important purpose, and to clear the way by the removal of all prejudices, he shall begin by tracing the origin of the Military Law of England, and its progress in the different periods of our history, to that regular system which at present obtains over the British dominions.



AN  
E S S A Y  
ON  
MILITARY LAW, &c.

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CHAP. I.

*Rise and Progress of the Military Law in  
England.*

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SECTION I.

*From the Conquest to the Reign of Charles I.*

THE English constitution had its progress from despotism to rational liberty, though by irregular and desultory steps; and the Military Law, which was from the earliest times a part of that constitution, as it must be of every regular government, exhibited the same improvement with the same irregularity in the steps of its progress.

The



The Feudal  
System a Military  
Establishment.

The Feudal system, in the state in which we find it in England under William the Norman, was entirely a military establishment.\* He divided the kingdom into sixty-two thousand two hundred and fifteen military fiefs or portions of land, all holden of the Crown, on the express condition of the vassals appearing in arms under his standard, with all their followers, whenever he should require their

\* It is quite unnecessary here to enter into the question of late disputed by our antiquaries, whether the feudal system existed in England during the Anglo-Saxon period, or was introduced by William. It is on all hands acknowledged, that at least the rigour of the military service was greatly increased by that Prince, and by his immediate successors, and that the condition of the subject became very different with respect to civil liberty under the Norman race, from what it had been under their Anglo-Saxon predecessors; of which fact this is an irrefragable proof, that in all the complaints made to the Crown, on the score of the feudal severities, previous to the grant of Magna Charta, a constant desire is expressed for the restoration of the mild laws of Edward the Confessor. What these particular laws were, we are unfortunately at a loss to know, as those which bear the name of this Prince are generally acknowledged to be of a later date, and at any rate do not correspond to the idea conceived of them, from the fact above mentioned.

service.

service. This obligation, in fact, rendered the Sovereign of England an absolute Monarch, as long as the Barons continued in their allegiance; a state in which the prince had it generally in his power to retain them, by availing himself even of their own jealousies and ambition, and by dexterously employing the strength of the many, to curb the dangerous pretensions of a few. Besides, in the earlier periods of our history, the Sovereign was enabled to compel the military attendance and service of his vassals, by the most cogent of all enforcements, the right which he had of confiscating or resuniting their fiefs\*; a right which, while it bound the subject, however unwillingly, to obedience and submission, greatly increased

\* Although the most usual punishment of the vassal's neglect of service was a pecuniary fine, yet there cannot be a doubt, that in England, as well as in all the other feudal kingdoms, the Sovereign had the right, and frequently exercised it, of depriving the vassal of his land, for an obstinate contempt of the summons to attend the royal standard. Of the exercise of this important power we find many instances recorded in Maddox, Hist. of the Exchequer, vol. I. p. 662.

the wealth, and consequent influence of the prince.

*Magna Charta.*

But in the mean time, the nation itself acquired a military spirit, which, directed to one object by the strong sense of general oppression from the exorbitant power of the Crown, became the engine for accomplishing its subsequent freedom. The Barons suffering under the tyranny of the Norman Princes, and feeling all equally the rigour of the feudal servitude, and more particularly the hardship of the forest-laws, which rendered even the precarious property, which they had in their lands of little value, as being for ever subject to the Crown's encroachments, united at length in so general a confederacy, and mustered in the field a body of such accumulated strength, that the Sovereign was compelled to yield to every term which they required of him, and to sign that celebrated Charter, which is the foundation of our free constitution.

Military Service of the Subjects.

But the *Magna Charta*, however important to the general liberties of the nation, did

did not abolish the great feudal bond, by which the subjects were tied down to Military service at the command of the Crown. Every possessor of a Knight's fief, of which there were, as above remarked, above sixty thousand in the kingdom, was bound to furnish a soldier to attend the King in his wars, during forty days in every year. Thus the king had, at his absolute command, and free from all expence, an army of more than sixty thousand men. As the Crown, however, in peaceable times, was more in want of money than of men, it became customary to take pecuniary commutations in lieu of personal service: though in reality the Military part of the feudal system was understood to be strictly constitutional, till it was formally abolished at the Restoration.

The Military establishment above mentioned, though of eminent service to the King in his foreign wars, was found inadequate for the regular and permanent defence of the kingdom. An Assize of Arms was therefore first enacted by Parliament,

ment, 27th of Henry II. and afterwards by the statute of Winchester, 13th Edward I. by which every subject, according to his rank and measure of fortune, was bound to provide a proportional quantity of arms for the maintenance of the King's peace: And by this last statute, constables were appointed to see the strict execution of the law, and to present to the justices all such defaults as they should observe; to which proviso was subjoined this special enactment, declaratory of the Royal prerogative, that "the King shall provide remedy therein\*."

Commission of  
Array.

To enforce the obligations of these statutes, it was customary for the Sovereign to issue, from time to time, *Commissions of Array*, directed to some of the principal men in each county, requiring them, at stated times, to muster, arm, and exercise the inhabitants of the district; and of these commissions of array, the form was settled by a statute passed in the fifth year of Henry

\* For a particular account of the assize of arms and commission of array, see Appendix, No. 1.

IV. The issuing of such commissions however ceased to be customary about the time of Henry VIII. when in their stead the Sovereign thought it more advisable to appoint Lords Lieutenants of the Counties, as the standing representatives of the Crown, to maintain proper order and discipline in the national Militia.

The right of the Sovereign to command the whole Military force of the kingdom, had been solemnly recognised by all the states, in a statute passed at Westminster in the reign of Edward I. 30th October, 1279, which, as it is of high importance in shewing the sense of the nation on this material part of the royal prerogative at that early period, it is proper here to engross at full length.

Statute of  
Westminster.

“ The King, to the justices of his bench,  
 “ sendeth greeting : Whereas of late, be-  
 “ fore certain persons deputed to treat  
 “ upon sundry debates had between us  
 “ and certain great men of our realm,  
 “ amongst other things it was accorded,  
 “ That in our next Parliament, after provi-  
 “ sion

“ sion shall be made by us, and the com-  
 “ mon assent of the Prelates, Earls, and  
 “ Barons, that in all Parliaments, treaties,  
 “ and other assemblies, which should be  
 “ made in the realm of England for ever,  
 “ every man should come without all force  
 “ and armour, well and peaceably, to the  
 “ honour of us, and the peace of us and  
 “ our realm: And now, in our next Par-  
 “ liament at Westminster, after the said  
 “ treaties, the Prelates, Earls, Barons, and  
 “ the commonalty of our realm there as-  
 “ sembled to take advice of this business,  
 “ have said, that to us it belongeth, and  
 “ our part is, through our Royal seigno-  
 “ ry, straightly to defend force of ar-  
 “ mour, and all other force against our  
 “ peace, at all times, when it shall please us,  
 “ and to punish them which shall do con-  
 “ trary, according to our laws and usages  
 “ of our realm; and hereunto they are  
 “ bound to us as their Sovereign Lord at all  
 “ seasons when need shall be, we com-  
 “ mand, &c.” 7th Ed. I. St. 1. c. 1.

This command and regulation of the whole Military force of the state <sup>1 Edw. III St. 2. c. 15</sup> was held to be so indisputably the prerogative of the Crown, and every person fit to carry arms, was understood, to be so strictly bound by the natural allegiance of a subject, to obey the King's summons, and appear in arms whenever called upon to attend the royal standard, that by a subsequent statute, 1st Edward III. St. 2. c. 15. it is declared, "that no man shall bind himself by any written obligation to come armed to the King, for that every subject is at his commandment;" for a particular and positive obligation ~~was~~ justly held to be unnecessary and improper, where there existed antecedently a natural and general duty of the subject, which all men alike were bound to fulfil.

~~It does~~ It does not however appear that the Sovereigns of England, in virtue of their constitutional prerogative of commanding the whole military force of the kingdom, exercised a power entirely discretionary over the army, or a jurisdiction altogether  
Court of Chivalry, or Constable's Court  
 D 3 , arbitrary



arbitrary in the trial and punishment of the individuals who composed it. The statute above recited of Edward I. acknowledges the King's power to punish only "according to the laws and usages of the realm." And it is certain that the Kings of England never personally interfered in inflicting punishments for military offences, any more than for those crimes and delinquencies which were cognizable by the civil courts. For the trial of military crimes, the King's Court of Chivalry, or the Court of the High Constable and Marshal of England, had, till the later periods of our annals, an appropriate and exclusive jurisdiction\*; and though it must at the same time be owned, that the rules or laws by which this court proceeded seem to have flowed entirely from the Crown, or at least to have been framed by the Sovereign, with the advice of the Constable and Marshal, and a few other officers of state, without undergoing the

\* See in Appendix No. II, an account of the powers of the Constable and Marshal, and of the Court of Chivalry.

sanction of Parliament; yet these Military Laws, being promulgated to the army\*, afforded a certain and positive rule of conduct, and while they imposed a check on the arbitrary procedure of the Court of arms or chivalry, furnished a security to the subject against partial oppression or injustice.

But this court of the constable and marshal had, as it appears, very early begun to stretch its jurisdiction beyond its just limits, and to trench upon the department of the civil judicatures of the kingdom. This was not unnatural in those times, when the feudal tenures made all men consider themselves as born to military service, and of course at least occasionally subject to military law. Accustomed to the jurisdiction of the court of chivalry, in all matters relative to war, which formed a great part of the business

Limitation of  
its jurisdiction  
by 13 Rich. II.  
C. 2.

\*Of these ancient codes of Military Law, some are yet extant; in particular, one compiled by Richard II. anno 1386, at the time when an immense army of 200,000 men was embodied for the defence of the kingdom against a meditated invasion from France.

of life, it was not easy to draw a distinct line of separation between these ~~and the~~ purely civil transactions, ~~of~~ which the cognizance belonged to the ordinary courts of justice. Accordingly, as courts are seldom disposed to limit their own jurisdiction, the court of the constable and marshal seems to have arrogated a cumulative judicature with those of the common law, since it became necessary for the legislature to pass a restrictory act, 13th Rich, II. c. 2. to correct that abuse.

This act, after stating that the encroachments made by the court of ~~the~~ constable and marshal on the ordinary courts of law were matter of serious complaint, defines the limits of the powers of the constable in these words: "To the constable it pertaineth to have cognizance of contracts touching deeds of armes, and of war out of the realm, and also of things which touch armes or war within the realm, which cannot be determined nor discussed by the common law; with other usages and customs to the same matters

“ matters, pertaining, which other constables heretofore have duly and reasonably used in their time.” This statute, however, still left to the Military court a jurisdiction so ample and comprehensive, that it was not to be expected it could long continue to be tolerated in that extent. by a nation ever jealous of the military power of the Crown, and unwilling to admit of any distinction between the character of soldier and of citizen.

Of this high military jurisdiction, the first abridgement was made in, the distracted reign of Henry VI, when the feeble authority of the Sovereign being equally insufficient for the exertion of his constitutional powers and for resistance of any infringement of them, the parliament made a bold attack on the power of the court of chivalry, by passing an act for the punishment of desertion, and transferring the cognizance of that crime to the civil magistrate. This statute, 18th Hen. VI. c. 19. proceeding on the ground, that  
 “ soldiers, after receiving part or the whole

Decline of the  
 Authority of  
 the Court of  
 Chivalry, Stat.  
 18. Hen. VI.  
 c. 19.

“ of

“ of their wages from their captains or  
 “ masters, for the term of service for  
 “ which their masters have indented\*,  
 “ have deserted and gone where they  
 “ would, long before that term was ex-  
 “ pired, whence great damage has arisen  
 “ to the King and to the realm,” enacts,  
 “ That every man so offending, unless  
 “ compelled by sickness, in which case he  
 “ shall repay his wages, in order to furnish  
 “ another in his place, shall be punished  
 “ as a felon;” and power is given to the  
 justices of peace to inquire and determine  
 in the trial of the crime.

Ratified by  
 7 Hen. VII.

From this period we may date the de-  
 cline of the authority of the constable and  
 marshal's court, and consequently of the  
 high military powers of the Crown. The  
 Sovereign, henceforward, became accus-  
 tomed to take the aid of parliament in en-  
 acting laws for the regulation of the army ;

\* It was customary at this period for persons to offer their  
 services to the Crown as officers, and to contract by indenture  
 to furnish a certain number of soldiers, for a certain sum,  
 during a stipulated term of service.

for

for ~~even~~ after the termination of the civil wars, and the complete settlement of the Crown by the accession of Henry VII. when the royal prerogative was at its height, we find a ratification of the act 18th Hen VI. in the 7th year of Henry VII. and the crime of desertion declared by parliament to be felony without benefit of clergy. By the same statute it is enacted, that if any Captain be retained to serve the King in his wars, either on sea or beyond the sea, and have not his perfect number of men and soldiers for which he contracted with the King, or shall not give them their full wages which he has received from the King, except the sums which he is allowed to retain for cloathing, (viz. 6s. 8d. for the year's cloathing of a yeoman, and 13s. 4d. for that of a gentleman) he shall for such default forfeit to the King all his goods and chattels, and his body to prison. The same act ordains every Captain to pay his soldiers their wages within six days of his receiving them from the King, under the same penalty.

This

And by  
3d Hen. VIII.  
c. 5.

This last statute and the preceding were ratified by 3d Hen. VIII. c. 5. which further ordains, that no Captain shall be charged upon this statute for lack of his proper number of soldiers, provided he certify to the King's Lieutenant within ten days, the departure or lack of such soldiers, if on land, or to the admiral of the navy, if at sea.

Stat. 2d & 3d  
Edw. VI. c. 2.

A more comprehensive law for the regulation of the army than any hitherto passed, and which in many of its enactments bears a near resemblance to our present Mutiny-act, is the statute 2d & 3d Edw. VI. c. 2. This statute, proceeding on the narrative, that many of the King's loyal subjects have, according to their bounden duty, and at a great expence, appointed and sent forth many soldiers to serve the King in his wars in Scotland and elsewhere, and that of these soldiers many have sold, lost, or fraudulently exchanged their horses and armour, gives power to the lieutenant, high-admiral, vice-admiral, warden, &c. or any of their

their deputies, to imprison the said offenders, until they make complete satisfaction. It empowers the justices of the peace to apprehend and commit them wherever they shall be found. It declares that those soldiers who shall desert from their officers without leave of the Lieutenant, shall be held guilty of felony without benefit of clergy. It imposes high penalties on all Captains or other Officers who shall take any reward from their soldiers for granting them discharges, without leave of the King's Lieutenants; and on such Officers as shall detain the pay or wages of the soldiers: it gives to the justices of peace the power of enquiring and determining in all cases of desertion: and finally, it ordains the contents of the said act to be proclaimed by every field-officer, in every field under his charge, once every month; and by every governor or captain of a garrison or fortress, once every quarter of a year, within his charge.

In



Stat. 4. & 5.  
Phil. & Mar  
c. 3.

In the statutes above detailed, the cognizance of the several offences therein described is declared to lie with the justices of the peace; and the form of trial is, by a subsequent act, 4th and 5th Phil. and Mar. c. 3. appointed to be by *Jury*, unless the offence be committed during the time of actual service; in which case the Lord Lieutenant, or Lord Warden, or any other Chief-tain, during the time of their commission, shall have power to determine in such offences according to their discretion.

These statutes sufficiently indicate, that the ancient judicature of the constable's court, though never expressly abolished, had gone entirely into disuse, and that the military authority of the Crown, though still acknowledged in its ministerial part, the supreme command of the army, was, as to its judicial part, exercised through the medium of parliament, and even by the intervention of the civil magistrate. But with respect to this latter particular, there was still room for amendment. The trial of Military crimes before the ordinary

nary justices of the peace, 'and by a jury of ordinary citizens, was contrary even to the general analogy of the English laws, and was evidently an incongruous and irregular procedure. If it was proper that the Military laws should be framed by parliament, of which generally a considerable proportion is of that class of men; it was no less proper that they should be administered by military men, in the trial of all offences regarding their own condition. But before arriving at this ultimate improvement, we must continue to trace, in a chronological order of detail, the various changes in the law-martial of England which was by no means uniformly progressive to mehioration, or to a regular and well digested system.

It had ever been deemed constitutional, for the Sovereign, in times of extraordinary disorder and turbulence, to use the military power of the crown, for the speedy repression of such enormities, and the restoring of the public peace. It must be allowed that there are seasons when the  
An Extension of the Martial Law necessary in times of danger.  
 ordinary

ordinary course of justice is, from its slow and regulated pace, utterly inadequate to the coercion of the most dangerous crimes against the state; when every moment is critical; and without some extraordinary remedy, the commonwealth would perish. The extension of a power beyond the law, is therefore in such times of danger justified, on the principle of absolute necessity; and there is every reason to treat with extreme distrust the motives of those pretended patriots, who, arraiging those necessary measures on the ground of a violation of the rights of the subject, would oppose their exercise, ~~be~~ the hazard ever so great that calls them forth.

Instances of its  
Use and Abuse

But this power, justified only by necessity, is to be used with the utmost circumspection. The English annals afford examples alike of its wise and salutary exercise, and of its flagrant abuse.

How exercised  
under Rich. II.

In the time of Richard II. when, during the actual movements of that formidable insurrection which had for its object the seizing of the King's person, and subverting

ing the whole frame of government, its leader Wat Tyler, though not actually raising his hand against the royal person, was killed by the Lord Mayor, and some of the most daring of his partizans were put to death at the feet of the King; this high exercise of the military power was never questioned, on the score of exceeding that just and necessary extension which the emergency required. But when, after the actual cessation of that rebellion, its ringleaders were seized, and many of them put to death without any form of trial, by the sole authority of the King's lieutenants; though no man doubted of the justice of their fate, the mode of their punishment excited general dissatisfaction; and it was found necessary for the King to use the authority of Parliament, for granting a general pardon to all those who, from no motives of malice, but solely from regard to the injured dignity of the Sovereign, and high sense of the outrage to the state, had exceeded the just bounds of law in the punishment

of those rebels\*. This example affords a criterion for ascertaining the limits within which it seems indisputable that this extraordinary power of the sword may be exercised in the hands of the Sovereign.

In the reign of  
Queen Mary.

When Mary, in her ardent zeal for the extirpation of heresy, issued, in 1558, a proclamation†, “That whosoever had in  
“his possession any heretical, treasonable,  
“or seditious books, and did not presently  
“burn them, without reading them, or  
“shewing them to any other person,  
“should be esteemed a rebel, and without  
“any farther delay be executed by the  
“Martial law;” it may be doubted whether, even in her own time, the most bigotted supporter of arbitrary power would have pretended to justify on any pretext of authority or constitutional principle, this extraordinary stretch of the Crown’s prerogative.

In the reign of  
Q. Elizabeth.

But even in the boasted times of Elizabeth, the splendour of the public acts of her reign, and the vigour and spirit with

\* 5 Rich. II. St. 1. c. 6.

† Burnet’s History of the Reformation, vol. 2. p. 363.

which

which her domestic administration was conducted, seem to have blinded the nation to the most daring violations of the rights of the subject. The exercise of Martial law on all classes of the people, was no more questioned as inherent in the royal prerogative, than the power of dispensing with the execution of the public statutes of the realm, the power of imprisonment at pleasure, the right of exacting loans and benevolences from the subject, and of erecting monopolies. It was not necessity that was cited to justify any infringement or suspension of law; the motive of convenience was equally sufficient for the prince; and the reason seemed equally plausible in the eyes of the people. A riotous mob having, in June 1595, committed great disorders in London and in the neighbourhood, and insulted the Lord Mayor in his attempts to quell them, Queen Elizabeth, though in the time of profound peace, issued her proclamation, appointing Sir Thomas Wilford her Provost-marshal, with power to apprehend

“ all insolent and desperate offenders; and  
 “ speedily suppress them by execution to  
 “ death, according to the justice of Mar-  
 “ tial Law\* ;” and this formidable edict  
 was carried into effect without the smallest  
 murmur on the part of the people.

In the reign  
 of James I.

In the succeeding reign of James I.  
 although a few speculative men began to  
 scrutinize with some strictness the founda-  
 tion of those state-maxims which the  
 Prince, with much imprudence, was daily  
 forcing upon the public mind; yet the high  
 prerogative of the Crown appears to have  
 lost nothing of the reality of its powers.  
 and the English government seems, even  
 in theory, to have been admitted to bor-  
 der upon an absolute monarchy. To this  
 effect the following passage from the State  
 Maxims of Sir Walter Raleigh is very re-  
 markable. “ Monarchies are of two sorts,  
 “ touching their power or authority, viz.  
 “ 1. Entire, where the whole power of or-  
 “ dering all state-matters, both in peace  
 “ and war, doth by law and custom ap-

\* Pymer's Fed. tom. 16. p. 279.

“ pertain

“ pertain to the Prince, *as in the English*  
 “ *kingdom*, where the Prince hath the  
 “ power to make laws, league and war; to  
 “ create magistrates; to pardon life; of  
 “ appeal, &c. Though to give a content-  
 “ ment to the other degrees, they have a  
 “ suffrage in making laws, yet ever sub-  
 “ ject to the Prince’s pleasure and nega-  
 “ tive will. 2. Limited or restrained, that  
 “ hath no full power in all the points and  
 “ matters of state, as the military King,  
 “ that hath not the sovereignty in time of  
 “ peace, as the making of laws, &c. but  
 “ in war only, as the Polonian King.”

In this reign were abrogated many of Statutes of  
Armour  
abrogated.  
 the ancient statutes which were conceived  
 to be unsuitable to the spirit of the times.  
 In particular, the statutes of armour, viz.  
 27th Hen. II. 13th Edw. I. & 4th & 5th  
 Phil. & Mary, c. 2. by which all subjects,  
 according to their fortune, were bound to  
 furnish a certain quantity of arms, horse,  
 harness, &c. were repealed by parliament,  
 2d Jac. I. c. 25. & 21st Jac. I. c. 28. The  
 abrogation of these ancient laws was, of



itself, a symptom of a considerable revolution of opinions with respect to the liberties of the subject. Commercial opulence, diffusing itself in a variety of channels, had fostered a spirit of independence in the great mass of the nation; and ambition, ever inseparable from riches, began to furnish views of the reciprocal rights of the Sovereign and People, very different from those which had till now prevailed in England.

## SECTION II.

*From the Reign of Charles I. to the  
Revolution.*

CHARLES I. succeeded to all the Charles I., authority and prerogatives of his predecessors. Inheriting from nature an elevation of mind, which would have prompted to act with dignity in any station of life, and educated to a high sense of the amplitude of those powers which had, for the period of near two centuries, been esteemed the legitimate rights of the Sovereign : acting, as he judged, on a principle of duty, as deeming it nothing less than treason in a Prince to impair himself, or allow to pass diminished to his successors, that authority which he regarded as a sacred trust committed to his hands ; he was induced, most naturally, but fatally for himself as well as for the constitution, to ad-

here to those precedents which the practice of some of the most popular of his predecessors had warranted, and for which the austere and uncomplying temper of his Parliaments furnished a much stronger apology than could ever in former times have been urged for the Crown. But the period was now arrived, when all encroachment on the part of the Sovereign, however sanctioned by practice, was to be rigidly repressed, all excrescence of authority cut down to the roots. Happy for the nation, had that laudable object been the limit of attack upon the regal powers: but a rigorous reformation once begun, the zeal of its abettors, roused into fury by the most culpable ambition, soon forgot every boundary of constitutional principle. Prevailing in every request which they made for the redress of real abuses, increasing in their demands with every new compliance, and spurning at length at all concession on the part of their humiliated and injured Sovereign, short of an absolute annihilation of the kingly office; the

last

last appeal was made to the sword, and the contest decided by the entire destruction of the constitution.

—In this fatal progress, it is easy to mark the steps of innovation on the high military powers of the Crown, and to draw a clear line of distinction between such as were just, necessary, and agreeable to constitutional principles, and those which are indefensible on any basis of justice, of expedience, or of legality.

Charles, pledged to a war for the support of his brother-in-law, the Elector Palatine (a measure to which the voice of the nation, and even Parliament itself, had, in the preceding reign, most strongly prompted) found his laudable ardour harshly repressed by his first Parliament, in voting a supply utterly inadequate to its purpose. Feeling his honour engaged to his foreign allies, the King was driven to the expedient, often employed by his predecessors, of issuing writs for borrowing money of the subject. But what constituted both the grievance and the illegality attending

attending this measure, was the billeting of soldiers on such as refused to lend. This was an exertion of the military power of the Crown, which, however it might be countenanced by former practice, was clearly unconstitutional, as repugnant to those ancient charters which established the general liberty of the subject. The army, ill-paid and undisciplined, and thus employed as a scourge on the people, committed numberless outrages, which the King had no other means of repressing than by a most rigorous exercise of Martial law. Commissions were given\* to the Lords Licutenants and their deputies, to proceed against all soldiers, mariners, and other disorderly persons joining with them, who should be guilty of felonies, robberies, murders, or other misdemeanors, according to certain instructions given by his Majesty, and to execute all such persons immediately as in time of war;† a remedy which the strict adherents

\* Rymer's Fœd. tom. 18. p. 751.  
† Rushworth, vol. 1. p. 168.

to constitutional principles deemed worse than that disease which called it forth.

It was with reason, then, that the Petition of Right, 3d Car. I. was levelled at these and other manifest abuses of the prerogative of the Crown. The sixth section of that important statute declares, that,

Petition of  
Right.

“Whereas of late, great companies of  
“soldiers and mariners have been dis-  
“persed into divers counties of the realm ;  
“and the inhabitants, against their wills,  
“have been compelled to receive them  
“into their houses, and there to suffer  
“them to sojourn, against the laws and  
“customs of this realm, and to the great  
“grievance and vexation of the people.

“7. And whereas, by authority of Par-  
“liament, in the 25th year of Edward  
“III. it is enacted, that no man should be  
“forejudged of life or limb against the  
“form of the Great Charter, and laws of  
“the land ; and by the said Great Charter,  
“and other laws of this realm, no man  
“ought to be adjudged to death but by  
“the

“ the laws established in this realm.—Ne-  
 “ vertheless, divers commissions under the  
 “ great seal have issued forth, by which  
 “ certain persons have been appointed  
 “ commissioners, with power and autho-  
 “ rity to proceed within the land, accord-  
 “ ing to the justice of Martial law, against  
 “ such soldiers or mariners, or other diso-  
 “ lute persons joining with them, as should  
 “ commit any murder, robbery, felony,  
 “ mutiny, &c., and by such summary  
 “ course and order as is agreeable to  
 “ Martial law, and as is used in armies in  
 “ time of war, to proceed to the trial and  
 “ condemnation of such offenders, and  
 “ them to cause to be executed and put to  
 “ death according to the law Martial.

“ 8. By pretext thereof, some of your  
 “ Majesty's subjects have been by some  
 “ of the said commissioners put to death,  
 “ when and where, if by the laws and  
 “ statutes of the land they had deserved  
 “ death, by the same laws and statutes  
 “ also they might, and by no other ought  
 “ to have been judged and executed.

“ 9. And

“ 9. And ~~also~~ sundry grievous offenders,  
 “ by colour thereof claiming an exemp-  
 “ tion, have escaped the punishments due  
 “ to them by the laws and statutes of this  
 “ realm, by reason that divers officers and  
 “ ministers of justice have unjustly refused  
 “ or forborne to proceed against such of-  
 “ fenders according to the same laws and  
 “ statutes, upon pretence that the said  
 “ offenders were punishable only by Mar-  
 “ tial law, and by authority of such  
 “ commissions as aforesaid; which com-  
 “ missions are wholly and directly contrary  
 “ to the laws and statutes of this realm.

“ 10. They do therefore humbly pray,  
 “ That your Majesty would be pleased to  
 “ remove the said soldiers and mariners,  
 “ and that your people may not be bur-  
 “ dened in time to come; and that the  
 “ aforesaid commissions for proceeding by  
 “ Martial law may be revoked and annul-  
 “ led; and that hereafter no commission  
 “ of the like nature may issue forth to any  
 “ person whatsoever to be executed as  
 “ aforesaid; lest by colour of them, any  
 “ of



“ of your Majesty's subjects be destroyed  
“ or put to death, contrary to the laws and  
“ franchise of the land.”

To this great retrenchment of the high military power of the Crown, which, though reasonable and necessary, in as far as it went to the correction of all abusive exertion of the prerogative, must be deemed excessive, inasmuch as it abolished altogether the exercise of the Martial law, even in cases of the most extreme and urgent danger, the King, with much reluctance, was obliged to consent. And here certainly it might have been expected that the spirit of reform would have found its limit. Other concessions of still greater importance to the general liberty of the subject, were made by the same state: as the abolition of all taxes, aids, and loans, without consent of parliament; the renouncing of the power of arbitrary imprisonment, outlawry, and exile, and the infliction of any corporal punishment, unless by due process of law; so that the change produced in the government by  
this

this single statute, is justly considered by all moderate men as almost equivalent to a revolution, and a new contract between the King and people. But concession only paved the way for fresh demands of restriction ; and the spirit of usurpation was soon more completely manifest on the part of the commons, than it had ever been, even in the worst times, on that of the Crown. \*

In the interval between the King's fourth and fifth parliament, the Scots having invaded England, an army of 21,000 men was raised by Charles for the necessary defence of the kingdom. From the want of all supplies by Parliamentary authority, the King was obliged to raise subsidies from the clergy, and to borrow money from his ministers and courtiers. *Coat-and-conduct* money was likewise levied from the counties ; an ancient practice, but of which it was generally thought the illegality was sufficiently declared, or at least necessarily implied in the Petition of Right. The army, tainted with puritanical

Its consequences with regard to the Mil<sup>itary</sup> State.

nical prejudices bore no good will to an expedition against the Scottish covenanters, and mutinies had arisen in many of the counties, in which several of the officers had been murdered by their men. To repress these enormities, a strong exertion of authority, and the strictest rigour of discipline were absolutely necessary. But how were these to be reconciled with the Petition of Right, which, in its ardour of reform, had swept away the Martial law altogether? The generals found their authority utterly insufficient for the maintenance of order; and recourse was had to the opinion of eminent lawyers for advice how to act in this critical emergency. It was now seen and confessed that the commons had deprived the Sovereign of a power absolutely essential for the preservation of the State. In want of a sure principle on which to found their opinion, the lawyers proposed an intermediate course, which is founded on no principle whatever. They declared that Martial law could only be exercised when  
the

The army was actually in sight of an enemy ; and the generals having executed one of the most daring of the mutineers, they advised an application to the Crown for pardon for this illegal stretch of authority\* ; a measure which, if actually resorted to, it was necessary to conceal from the army, otherwise all military subordination must have been at an end.

In 1642, after the long parliament had voted its own perpetuity, and obtained the King's consent to that decisive measure, which untinged the whole frame of the constitution, the Commons, sensible that the sword alone could give security to their usurped power, were determined, by one bold stretch of authority, to provide for themselves this important safeguard, and at the same time entirely to disarm

The Parliament assume the Military Power.

\* This opinion was so repugnant to the sentiments of the officers of the army, that Lord Conway boldly declared, that if the King would give him a commission to execute Martial law, he would stand to the consequence ; and if any lawyer should deny his authority, he would hang him up, as the shortest way of refuting his argument. Rushworth, vol. 3. p. 1199.

the Crown. A fatal (though perhaps at the time unavoidable) concession of the King had afforded a pretext suitable to their wishes. The rebellion raging in Ireland, Charles, at that time in Scotland, felt, from the late restrictions on the military prerogative, his utter inability to suppress that dreadful insurrection. He committed to the parliament the charge and prosecution of the war in Ireland; a commission of which they immediately availed themselves, as of a transference into their hands of the whole military power of the Crown.

A bill was now prepared “for the better raising and levying of soldiers for the present defence of the kingdoms of England and Ireland,” in the *preamble* of which it was expressly declared, that the King’s power of pressing soldiers, which had been acknowledged in all former times as belonging to the Crown, was illegal, unless in the case of sudden invasion; yet this power being necessary to be exercised at this time for the suppression  
of

of the rebellion in Ireland, and the prevention of conspiracies in England, authority was given to the justices, &c. to impress such a number of men as his Majesty and the two Houses of Parliament should appoint. The King signified his readiness to pass the bill, provided the preamble was omitted; but this desire being intimated while the bill was only in dependence, was declared by the commons to be a high breach of privilege. The King apologized for his error, and the bill *with its preamble* passed the two Houses, and received the royal assent\*.

Proceeding in their exercise of the military power, the parliament now took the command of all the garrisons and fortified places. The town of Hull, which contained a vast store of arms, the Tower of London, the principal magazine of the kingdom, Portsmouth, and the command of the fleet, were all committed to officers appointed by parliament, and strictly enjoined to

\* Rushworth, vol. 5. p. 554.; Parl. Hist. vol. 10. p. 110.

act only by their orders. Lieutenants and deputies for the counties were nominated by the commons, and declared accountable to them alone for their conduct, and a bill was prepared for transferring at once the command and ordinance of the militia into the hands of their commissioners. To this last usurpation, decisive of a design of utterly overthrowing the constitution, Charles gave a firm and pointed refusal of his assent; which was answered by a vote of the Commons, declaring the King's advisers to be enemies to the state, and approving of the measures of all such of the subjects as should put themselves in a posture of defence against the common danger\*. This vote, when considered with its preparatory, and accompanying circumstances, was equivalent to a declaration of war. The ostensible authority of the King was, however, still considered as essential to all exercise of the military power; and the Commons issued their orders in the name of their Sove-

\* Rushworth, part 3. vol. 1. c. 4. p. 524.

foreign\*, for assembling and mustering the militia, and for the levying of troops to be employed in actual war against his person, and for the utter suppression of his power and functions.

It was now necessary to oppose force to force. The ordinance for the mustering of the militia, was a measure of the Commons alone; for though issued in the name of Lords and Commons, a majority of the former in a full house had rejected it as utterly unconstitutional†. The King therefore, by proclamation, prohibited all persons whatever from yielding obedience to this illegal order, and issued at the same time his commissions of array to certain of the nobility, for summoning out and mustering the militia in several of the counties. In the former of these measures the King stood clearly justified upon the soundest principles of the consti-

\* A sophistical distinction was now invented between the office and the person of the King. The parliament in their edicts bound all persons to obey the orders of his Majesty, *signified by both Houses of Parliament.*

† Rushworth, vol. 5. p. 657.



tution; but in the latter, the point of legality was more questionable; for although such commissions appear warranted by immemorial practice of the Crown in former reigns, yet as the Petition of Right had established the people's immunity from all taxes, aids, or other charges, than such as were imposed by consent of parliament, this command from the King alone to draw forth the militia, and arm them at the expence of the counties, might plausibly be construed into a violation of that statute. The fair conclusion to be drawn is, that both parties were now pursuing measures which it is impossible to justify upon any ground of strict legality; but there was this difference in favour of the Sovereign, that his was a defensive struggle, for the maintenance of the just, the necessary, and hitherto acknowledged prerogative of the Crown, which his opponents had violently and most unwarrantably invaded; and if in this contest he transgressed any established limit, it was none of those which the constitution had hitherto

hitherto acknowledged, but only such as their usurpations had compelled him to submit to.

It is foreign to our purpose to enter into <sup>The Civil</sup> any detail of that calamitous war which ensued, and which terminated in the extinction of the monarchical government. It is necessary, however, to remark, that the parliament, hitherto so zealous for the utter abolition of Martial law while its exercise was constitutionally in the Crown, now found the necessity of assuming this power to themselves in its utmost latitude, for the regulation of that army which had taken the field against their Sovereign. An ordinance was accordingly framed for that purpose, and passed in August 1644 by both Houses\*, of which the following are the principal heads and clauses :

The Earl of Essex, captain-general of the Parliamentary forces, together with the Earls of Northumberland, Kent, Pembroke, Salisbury, Manchester, Denbigh, and forty-nine others of the nobi-

Ordinance of  
regulating the  
Army.

\* Parliamentary History, Vol. 13. p. 270.

lity, gentry, and principal officers, or any twelve of them, are appointed commissioners, with full power to hear and determine all such causes as "belong to military cognizance," according to the following articles; and to try, condemn, and execute all offenders against them, or otherwise punish them according to the nature of their offences.

"Art. 1. No person whatever shall go from London and Westminster, or any part of the kingdom under the power of the Parliament, to hold any communication whatever, either personally, by letters, or messages, with the King, Queen, or Lords of the Council abiding with them, without consent of both Houses, or their committee for managing the war, or the Lord General or officer commanding in chief, on pain of death, or other corporal punishment at discretion.

"2. Whosoever shall plot, contrive, or endeavour the betraying or surrendering to the enemy, or shall actually betray  
and

And surrender, contrary to the rules of war, any cities, towns, forts, magazines, or forces under the power of the Parliament, shall be punished with death.

“ 3. No person whatsoever, not under the power of the enemy, shall voluntarily relieve any person being in arms against the Parliament, knowing him to be so, with money, victuals, or ammunition, on pain of death, or other corporal punishment at discretion; nor shall voluntarily harbour any such, on pain of such discretionary punishment.

“ 4. No officer or soldier shall make any mutinous assemblies, or be assisting thereunto, on pain of death.

“ 5. No guardian or officer of any prison, shall willfully suffer any prisoner of war to escape, on pain of death; or negligently, on pain of imprisonment, and further punishment at discretion.

“ 6. Whosoever shall voluntarily take up arms against the Parliament, having taken the national covenant, shall die without mercy.

“ 7. What-

“ 7. Whatsoever officer or commander shall desert his trust, and adhere to the enemy, shall die without mercy.

“ Further, the said commissioners, or any twelve of them, shall be authorised to sit, as often as they shall think fit, or shall be ordered by both or either House of Parliament, in some convenient place in London or Westminster, or lines of communication; and to appoint a Judge-Advocate, a Provost-Marshal, and all other necessary officers.

“ And further, all mayors, sheriffs, justices, constables, bailiffs, &c. are required to aid the said commissioners in the execution of the premises.

“ Provided, that no member of either House of Parliament, or assistants of the House of Peers, shall be subject to the authority of the said commissioners without consent of both Houses:—And the endurance of this ordinance is limited to four months, from eight days after the publication of the same.”

The

The military power, in the hands of the Parliament, was exemplified in a variety of orders issued from time to time for the conduct of the war; and among others, a regulation was made, that all soldiers and officers of the city's marching regiments should instantly repair to their posts, under pain of immediate death to the common men, and a trial by Martial law to the officers; an ordinance of singular spirit from the same men who had denied the competency of punishing, by the Martial law, (unless when actually in sight of an enemy), even the most atrocious act of mutiny, namely, soldiers murdering their officers.

Many trials by Court Martial were held under this ordinance of the Parliament. Sir Alexander Carew was tried for a design to deliver up the garrison of Plymouth to the King, condemned, and beheaded. Sir John Hotham, formerly governor of Hull, was tried by the same

Trials by  
Court-Martial.

\* Parliamentary History, vol. xiii p. 299.

court on five several charges\*. 1. Betraying his trust, and adhering to the enemy. 2. His refusal to supply the Lord Fairfax with ammunition, to the great prejudice of the Parliament. 3. His scandalous words against the Parliament. 4. His endeavour to betray Hull to the enemy. 5. His correspondence with the Queen, and his seeking to escape. He was condemned, on the testimony of thirty witnesses, and the evidence of his own letters, to be beheaded on Tower-hill. The House of Lords, on a petition from himself and his son, voted him a pardon, and desired the concurrence of the Commons in that measure. They sent, at the same time, their messenger with a warrant to stay the execution. The Commons declared this procedure of the Lords to be most illegal: they resolved that they would not even take the subject of the pardon into consideration; but passed a vote, that no order of either House, without the previous consent of the other, should be ef-

\* Whitlock's Mem. p. 110.

fectual to ~~stay~~ the operation of justice; they then sent their *own* order to the Lieutenant of the Tower for immediate execution; and the prisoner was accordingly beheaded.

Mr. L'Estrange (afterwards the well-known Sir Roger L'Estrange) was tried under the ~~same~~ ordinance, by the city Court Martial of London\*, on the charge of his coming as a spy, without drum, trumpet, or pass, from the King's quarters at Oxford, and tampering with the lieutenant-governor of Lynne-Regis, to deliver up that garrison to the King. He was condemned to death, but petitioned the Parliament, on the ground that "he had a commission from his Majesty for reducing the town of Lynne, and had been ever openly in arms for the King's party." The Lords ordered the Judge-Advocate of the Court-Martial to attend, and give an account of the proceedings;

\* Of this Court-Martial L'Estrange says, "two prime men were a salesman and an hostler." *Truth and Loyalty vindicated.* 1662



from which it appeared that the judgment of the court was founded on this reason, ~~that~~ <sup>that</sup> Mr. L'Estrange's commission was not the commission of a "soldier, but a commission of mere bribery and corruption, to make a party by offers of money and preferment." The Lords granted a ~~reprieve~~, and sent the prisoner to Newgate, whence, after a confinement of four years, he made his escape, and got beyond seas. On the expiration of the ordinance under which these trials were held, another was framed nearly to the same purpose, but with the additional proviso, that all the officers of the army should be nominated and approved of by both Houses, and should, within twenty days of their appointment, subscribe the national League and Covenant. The bill to this effect, however, met with some opposition from the House of Lords; nor was the new ordinance for the regulation of the army

\* Probably with the concurrence of the other House, otherwise the late vote of the Commons must have been very ineffectual.

passed

passed till several months after, when the Lords at length gave their consent, nine Peers entering their protest against it. By this ordinance forty officers, specially named, together with some civilians and common lawyers, or any twelve or more of them, were appointed a Court-martial within London and Westminster, to try all offenders against any of its regulations: but no execution of death was to follow on any of their sentences till after six days notice to both Houses of Parliament. The duration of this ordinance was limited to three months.

The war was prosecuted for some time with alternate success, and therefore promised no speedy termination. The party of the Independents, whose object was decidedly the utter extinction of the monarchy, apprehending opposition to this plan on the part of Essex and others of the parliamentary generals, prepared a most artful measure for their removal, and for the entire new modelling of the army. The self-denying ordinance was framed, by which

The Self-denying Ordinance

which all members of Parliament were declared incapable of holding any military or civil employment; and from the prevailing influence of the Independents, the bill, after much contest, was passed by both Houses. Essex, Warwick, Manchester, Denbigh, and many others, immediately resigned their military commands. Cromwell, who himself had planned the measure, was of necessity included in its operation; and thus ought either to have lost his seat in Parliament, or his commission of Lieutenant-General; but this would have frustrated the views of the party. It was therefore most artfully contrived, that while he declared his intention of resigning his commission, and thus retaining his seat with the Commons, the new general in chief, Sir Thomas Fairfax, should petition the parliament for a special exception in Cromwell's favour, on the ground that his services with the army could not be dispensed with. The request was granted; and thus Oliver Cromwell, who had an entire ascendant over Fairfax, was

was in reality invested with the chief military command; while at the same time his influence in Parliament directed all its proceedings.

At this very time, however, a negotia-  
Treaty of  
Uxbridge.  
tion was going on for a peace between the King and Parliament; contrary, indeed, to the wishes of the ruling party, in the latter; and therefore with small prospect of success. The commissioners on both sides met at Uxbridge, and conferences were held on certain special demands made by the Parliament, touching the important articles of *Religion, the Military power, and Ireland*. With respect to the military power, the King offered, that the arms of the state should, for *three years*, be entrusted to twenty commissioners, who should be named either by mutual agreement between him and the Parliament, or one half by him and the other by the two Houses; and he required, that at the end of that term, he should be invested with his constitutional authority over the militia and army. The commissioners of Par-  
G
liament

liament insisted, that the Parliament alone should command the military force of the State ; or at least that this authority should be declared to belong to them for seven years ; at the end of which period it should be settled by a solemn act of the Législature, proceeding on the common agreement of King and Parliament. It was urged in reply, that this was nothing else than submission at discretion ; and that unlimited power being thus vested in the Parliament for so long a period, it would be easy for them so to frame the subsequent bill, as to keep possession of it for ever. The demands with respect to Ireland were nothing short of the absolute sovereignty of that kingdom, and the whole administration civil and military. When it is added, that these demands, however exorbitant, were nothing more than preliminaries on the part of the parliament, which they required to be granted, before proceeding to discuss the terms of a treaty, by which the King was required to sacrifice all his friends and partizans to attain-

der

Order and forfeiture, to relinquish the nomination of all the officers of state and judges, and the right of making peace and war; it can excite no surprise that the negotiation should break off with mutual disgust between the parties, and a spirit of greater alienation than had appeared at its commencement.

Mean time, in consequence of the *self-denying ordinance*, the army of the parliament was entirely new-modelled, by a total change of its officers, and the introduction of a more rigorous discipline, in the enforcement of which, Religion was called in to the aid of the military power. In the exercise of this regenerated army, preaching and prayer went hand in hand with the Martial duties; and every colonel and captain, in the intervals of actual service, exhorted, catechised, and documented his flock in the great concerns of that spiritual kingdom, for the interests of which they were taught to believe that they were now engaged. This policy had its effect: The discipline, the zeal, and even the courage

The Army  
new-mo-  
delled.

of the parliamentary forces were conspicuously superior to those of their opponents; and the entire defeat of the royal army in the battle of Naseby terminated the war. The King was betrayed into the hands of the parliament, and seized soon after by the army, who, availing themselves of the possession of the person of their Sovereign, were rapidly proceeding to the establishment of that military despotism which was finally to subdue both the parliament and the nation.

Agitators.

In the regulation of this army, which was destined to atchieve enterprises of such magnitude, Cromwell displayed in a signal manner both the political artifice and the vigour of his mind. When the war was at an end, the parliament, wishing to be rid of the army, proposed a great reduction of the forces, and the embarkation for Ireland of a large portion of the residue. This measure would have proved fatal to the ambitious designs of Cromwell: he planned immediately a military parliament, which should counteract and controul

controul the civil. Together with a council of the principal officers, two men, termed *Agitators*, were elected from each company as their representatives; and the purpose of this council was to collect and methodize the *grievances* of the army, to convey the sense of these in an impressive manner to the parliament at Westminster, and urge their speedy and effectual redress. Possessed of the person of the King, the army boldly treated with the parliament, as rival powers, whose purpose, though not yet openly avowed, was known to each other to be the government of the nation. The military council impeached of high treason eleven of the parliamentary leaders, whom they regarded as enemies to their cause: they imperiously demanded that the Militia of London should be entirely changed; and the populace petitioning against that measure, the army marched to the vicinity of the capital, with the purpose of forcing a compliance with all their demands. The parliament, sensible of its weakness, wisely submitted to its conquerors.



Mutinous Spirit of the Army  
quelled by  
Cromwell.

It was now necessary for the full accomplishment of his plans, that Cromwell, master of the parliament, should moderate and quell that spirit of arrogance in the soldiery, which, in the pursuit of that object now attained, he had hitherto been at such pains to foster. He therefore bent himself seriously to reform the disorders of the army, and to that end exhibited an energy of discipline rigorous beyond all example under the former monarchy. The agitators, now known by the name of *Levellers*, extending their enquiries beyond the particular grievances of the army, had presumed of late to enquire into the state of the nation at large, to dictate certain improvements on parliamentary representation, and to remonstrate on the subject of religion, and on the inequality and injustice of the laws. Seditious petitions from several regiments were presented to both houses: Cromwell issued orders for the discontinuance of all meetings of the agitators: but finding that these were secretly continued, and

and that the whole army would speedily be in a state of anarchy and total insubordination, he determined, by a daring exertion of power, to remedy this alarming disorder. Receiving intelligence of a rendezvous of several of the regiments, which had been called without authority of their commanders, he marched at the head of his troop to the place of meeting; and seizing with his own hand the most active of the leaders, he called a council of war upon the field: Three of them were tried and condemned to death, and one on whom the lot fell was instantly shot at the head of his regiment. It is remarkable, that at the time of this vigorous display "of the justice of Martial law," there was in fact no legal authority existing for its exercise; for the last ordinance had expired above a year before, and had never been renewed.\* But it

G 4. . . . . does

\* For this high exercise of the military power, in his own person, Cromwell disdained to use any subterfuge. He rightly conceived it to be implied in his office of General in Chief. 'The General,' (says Whitlocke, *Memorials*, p. 422) sent his orders

does not appear that any question was stirred on the score of this irregularity; and a few such examples reduced the whole army to submission and obedience. At this time Cromwell might with truth be said to have attained, though not the exterior symbols, yet the reality of absolute power; since he had the entire command both of the parliament and of the army. The subsequent measures he pursued, in modelling the commons entirely to his purpose, of defeating all plans of accommodation with the King; annihilating the authority of the Upper House; and finally bringing his Sovereign to the Scaffold, were the natural and easy consequences of the ascendant he had obtained over all that remained of a legislative power, and the absolute command which he possessed of the military force of the nation.

"orders to several garrisons to "hold Courts Martial, for the  
 "punishment of soldiers offending against the articles of war;  
 "provided that if any be sentenced to lose life or limb, that  
 "then they transmit to the Judge Advocate, the examinations  
 "and proceedings of the Court Martial, that the General's  
 "pleasure may be known thereupon."

After

After the extinction of the monarchical government, that select assembly of the independent faction which styled itself a parliament, passed a bill for establishing a Court Martial "within the cities of London and Westminster, and the lines of communication," which was to bear the name of "*The High Court of Justice*;" a significant intimation that Martial law might then be deemed the paramount law of the state. The levellers had again begun to exhibit a spirit of mutiny, and to disquiet the parliament by remonstrances on the state of the nation. The high court of justice was therefore an useful engine for the maintenance of good order; and the dispatch with which its proceedings were conducted, tended materially to facilitate the operations of the new government, by that salutary awe which attends all vigorous exertions of power.

In the same spirit of policy, well suited to the times, it was judged necessary to extend the laws of treason far beyond the limits within which they had been confined

High Court-Martial.

March 1649,

May 14. 1649,

fined during the monarchy. They were  
 now declared to reach verbal offences, and  
 even intentions, though not followed by  
 any overt act. "To affirm the present go-  
 vernment to be an usurpation; to assert  
 that the Parliament or Council of State  
 were tyrannical or illegal; to endeavour  
 subverting their authority, or stirring up  
 sedition against them," were all declared  
 acts of high treason, by a statute passed  
 14th May 1649\*. The power of arbitrary  
 imprisonment, an engine of tyranny justly  
 abolished by the Petition of Right, was  
 now renewed and vested in the Council of  
 State; and a rigorous statute passed for re-  
 straint of the press, prohibiting, under se-  
 vere penalties, the printing of any books,  
 pamphlets, or newspapers, without a li-  
 cence under the hand of the clerk of par-  
 liament, or, "in as much as they may  
 concern the affairs of the army, under  
 the hand of their secretary for the time."

Sept. 14, 1649.

Military Na-  
 ture of the Go-  
 vernment.

Under the Protectorate of Cromwell,  
 the government of England was altogether

\* Parl. Hist. vol. 19. p. 122.; Hume's Hist. of Eng. vol. 7.  
 military

military and despotal. The Protector was invested with the right of making peace, war, and alliance, ~~on the~~ <sup>on the</sup> advice of his council, a set of officers entirely devoted to his interests, and the power of the sword was ~~placed~~ <sup>placed</sup> in his hands jointly with the parliament sitting, or with the council in its intervals of meeting. A standing army was established of 20,000 foot and 10,000 horse, of which he was the commander in chief. These were not to be diminished without the consent of parliament; but in this article Cromwell assumed a negative voice. A meditated insurrection of the royalists furnished him with a pretext for imposing a tax of a tenth, to be levied on the whole property belonging to that party throughout the kingdom; and for the collecting of this imposition, the Protector divided the kingdom into twelve *Military jurisdictions*, under as many *Major-Generals*, who were empowered to levy this decimation-tax from whom they pleased, and to enforce it by seizure of the persons and distraining

ing

ing of the estates of all such as were refractory. These twelve military governors had likewise a power of raising each of them a body of horse and foot to be paid by the nation, and who should be independent of the officers of the army, and subject only to the command of the Major Generals. Thus the Protector had, in case of emergency, a second army, either to aid the operations of the first, or powerful enough to controul it, if falling off from its implicit obedience to his will, a most artful arrangement, which completed the fabric of military despotism †.

The Restoration.

A government, whatever be its origin, acquires force from the mere circumstance of its being established. The protectorate, the commonwealth, or whatever may be its most proper appellation, might have

Parl. Hist, vol 19. p. 43., Clarendon, b. 15.

† The powers of the Protector's courts martial carried the justice of martial law to an unusual height. Whitlocke tells us that the towns in Scotland having given reception to the King's troops, the offence was tried by a court martial, a fine was imposed, and the houses ordered to be razed to the ground, *Memorials*, p. 567

continued

continued for many years to be the government of England, and the successor of Cromwell inherited his abilities. But the structure which he had reared possessed no strong principle of durability in itself; its parts were discordant, and its union reluctant. As there was a silent but earnest struggle between the prejudices and habits of the ancient monarchy, and the maxims and policy of the new arrangement. It was natural, therefore, that when the strong hand was removed which bound together this vast machine, the fabric should speedily tend to dissolution, even by the operation of its chief moving power. It owed its origin to military force; and the same force destroyed it. The army of Monk, superior to that of Lambert, the General of the republican parliament, dictated to that assembly the vote for its own dissolution; and the new parliament, uttering the sense of the nation, immediately restored the monarchy.

But this very experiment of the power of this formidable engine of revolution, ex-

The Army disbanded, Sept 1660.



cited a just apprehension, and jealousy of its misemployment; and among the earliest resolutions of the new parliament, was that for disbanding the army. This measure was not cordially agreed to by the King, who considered a standing army as a very necessary appendage of monarchy. But the Chancellor, Gloucster, who knew the temper of those veteran troops, convinced him, that instead of being a security of his government, there was the utmost danger of their shaking it to the foundation. A body of troops to the amount of 5000, was however still kept on foot for guards and garrisons, an armament which was regarded by the people with an eye of jealousy, as the rudiments of a standing army.

Military Tenures abolished by 12 Car. II. c. 24.

A statute immediately followed, abolishing the ancient military tenures, or the holding of lands by knight's service *in capite*, which drew after it homage, service in the King's wars, escuage, wardship, marriage, &c. and all tenures held either of the King or of any other person, were declared

declared thenceforward to be changed into free and common soccage.

This parliament, of which a great proportion was of the Presbyterian party, was not disposed to restore to the Sovereign the full extent of the ancient prerogative of the Crown. The regulation of the militia, the great source of former dissension, was not resigned to the King; and in several of the statutes of this assembly, the proceedings of the Long Parliament were in effect justified and applauded.

Of a very different temper was the Parliament which succeeded. They began by a solemn recognition of the ancient prerogative, by declaring it to be the sole right of the Sovereign to command and regulate the whole military force of the realm. The statute 13th and 14th Car. II. c. 3. entitled, *An act for ordering the forces, &c.* proceeds upon the following preamble: "Forasmuch as within all his Majesty's realms and dominions, the sole and supreme power, government, command, and disposition of the militia, and of all  
 . " forces

The Military Power of the Crown solemnly recognized.

“ forces by sea and land, and of all forts  
 “ and places of strength, is, and by the  
 “ laws of England ever was, the undoubt-  
 “ ed right of his Majesty and his royal  
 “ predecessors, Kings and Queens of Eng-  
 “ land; and that both or either of the  
 “ Houses of Parliament cannot, nor ought  
 “ to pretend to the same; nor can, nor  
 “ lawfully may raise or levy any war, of-  
 “ fensive or defensive, against his Majes-  
 “ ty, his heirs or lawful successors, &c.”  
 And by the same statute it was ordained,  
 that all Lords-Lieutenants, Deputy Lieu-  
 tenants, officers, and soldiers, should take  
 the following oath. “ I do declare and  
 “ believe, that it is not lawful, upon any  
 “ pretence whatsoever, to take arms against  
 “ the King; and that I do abhor that trai-  
 “ torous position, that arms may be taken  
 “ by his authority against his person, or  
 “ against those that are commissioned by  
 “ him in pursuance of such military com-  
 “ missions: So help me God.” The re-  
 cent experience of the nation justified the  
 propriety of imposing on the army this ex-  
 plicit

pllicit renunciation of the doctrine of *Resistance*; but so strongly had the current of opinion set in towards royalty, that a bill was actually introduced into parliament for imposing this oath upon the *whole nation*; and it was rejected as unnecessary, only by a majority of three voices. 166

But this dawn, so auspicious, to the rising influence of the Crown, was soon overcast. The expence of the Dutch war, and its abortive issue, weakened the popularity of Charles; nor did the expedience and good policy of the Triple Alliance restore him to the public favour. The dark councils of the *Cabal* urged him to throw off his dependence on his parliament, whose parsimonious supplies bore no proportion to his expences; and the strong partiality he shewed towards the Catholics, undermined him in the affections of all the friends of the national church.

In the debate on the supplies for carrying on the war against France in 1678, the Commons openly expressed their apprehension that the troops and money to be

voted for that ostensible purpose were to be employed by the King against the liberties of his people. In the same spirit, they soon after claimed a joint regulation and command of the militia; insisted that the King should disband the army; and in the articles of impeachment against the Treasurer Danby, accused that minister of co-operating in the design of employing the standing forces as an engine of arbitrary power for the subversion of the government.

A succeeding Parliament exhibited a temper still more hostile to the power of the Crown. The chimeras of the Popish plot, while they disturbed the imaginations of the people at large, excited fresh cause of disgust between the King and Commons, in the harsh measures pursued by the latter for the exclusion of the Duke of York from the succession: and Charles, after the fruitless trial of many conciliatory expedients, dissolved two successive Parliaments, and ruled for the remainder  
of

of his life without the medium of that assembly.

In this reign, the military power of the Crown, though established at first in the highest extent in which it had ever been since the reign of Elisabeth, sustained in the end, as we have seen, some rude shocks from the alarmed jealousy of the nation; and it is not improbable, that had the King, instead of this final resolution of governing solely by his prerogative, assembled another Parliament, he must either have freely consented to a very great diminution of his authority, or renewed the calamitous scenes of the last years of his father.

In the beginning of the reign of James James II II. the defeat of Monmouth's rebellion gave occasion to some dreadful exertions of the Martial law, in the punishment of his adherents: nor was the evil materially remedied, when, in consequence of complaints of the illegality of those proceedings, the King remitted the trial of such offenders to the civil Courts of Justice:

for these, it was alleged, had the same sanguinary instructions ; and the sentences of Jefferies, with all the rigour and celerity of military execution, excited the greater abhorrence that they were issued from the tribunals of the law. The same rebellion furnished to the King a pretext for maintaining on foot a standing army of 30,000 men, which he ostentatiously displayed to the people in frequent reviews and encampments, to overawe and restrain all spirit of resistance to the plan he seems to have formed of invading at once every part of the constitution. It was fortunate in the main that this plan became so soon apparent, and that the measures for its accomplishment were taken with such violence of indiscretion, as to shorten the crisis of a disease which precluded all prospect of recovery.

The Revolution.—*Declaration of Rights.*

The period of the Revolution is the era when the Military law assumed a regular and permanent form. By the *Declaration of Rights*, previously debated and voted in the Convention of the States, and solemnly

lemnly assented to by the Prince and Princess of Orange, as the essential conditions on which they received the Crown, it was settled in positive terms, “ That the raising  
“ and keeping of a standing army in time  
“ of peace, *without consent of Parliament,*  
“ is contrary to law.” This, with the declaration “ That the subjects, if Protestants, may have arms for their defence, suitable to their condition, and as allowed by law,” are the only articles in that important deed regarding the military power of the Crown; which must therefore be considered as resting in its essentials on the broad basis on which it was placed by the statute 13th and 14th Car. II. c. 3.

In the first year of the reign of William and Mary, several of the British regiments had begun to shew strong symptoms of disaffection to the new government, from a jealous resentment of the preference which the King was supposed to shew to his Dutch troops. Among the rest, the Scot-



tish regiment of Dunbarton, formerly commanded by the Duke of Monmouth, being ordered for embarkation to Holland, to replace a regiment of Dutch guards which the King wished to retain in England, openly mutinied at Ipswich, seized on the money appointed for their pay, disarmed their officers, and declared their adherence to the abdicated Prince. 'The King thought proper to communicate this event to Parliament ; but at the same time he used the shortest method of quelling the insurgents, by marching against them three regiments of Dutch dragoons. The Parliament, desirous of repressing this mutinous spirit of the army, but yet equally desirous of preserving to themselves some check upon the exercise of the military power in the hands of the Sovereign, thought it expedient to interpose their authority, by arming him with a Mutiny-act, which should be a warrant of unquestioned legality for the punishment of all military crimes.

The

The first regular *Mutiny-act* was there-  
fore passed on the 3d day of April 1689,  
for the endurance only of six months. It  
has however, from that time, with the ex-  
ception of a single interval of three years  
during the reign of King William, been  
annually renewed by Parliament, from the  
same motive of a wise and cautious policy;  
and thus the Military law executed by the  
Sovereign, but authorised, and in fact  
framed by the legislature, rests upon a  
basis of the most undisputed legality.

The first  
*Mutiny-act*

We are intitled to conclude from the  
preceding detail, that amidst all the fluc-  
tuations of government, and the changes  
of our constitution, in the alternate exten-  
sion and retrenchment of the royal prero-  
gative, the fundamental right of the Sove-  
reign to *command the military force of the  
state* has ever been acknowledged; unless  
in that calamitous period, when the whole  
frame of the constitution was unhinged  
and overthrown, and an anomalous tyranny  
substituted in its place, under the false  
title of a Republic. • A standing army,

ever an object of jealousy to a free people, is now clearly understood to owe both its existence and duration solely to the will of Parliament ; and while the supplies for its maintenance can be retained or granted at their pleasure ; while the Sovereign, even in the regulation of this army, acts only by their authority, and through their medium ; it must be acknowledged, that there can not exist a reasonable apprehension of the abuse of that power of the sword, which is vested in the only hands in which it could be exercised at once with useful energy, and with perfect security to the liberties of the nation.

## CHAP II.

### *Of the Authority of Courts-Martial.*

WE have now seen, from the historical detail given in the preceding chapter, and the deduction in the close of that detail, that the Martial law, as it exists at present in these kingdoms, forms a part of the law of the land; that it is enacted by the same authority which is the origin of all other statutory regulations; and consequently that it has the same positive obligation on those whom it is intended to bind, as the common and statute law has on the whole subjects of the realm.

By the British Mutiny-act, which now *Articles of War* since the union extends to Ireland,\* and

\* Before the union with Ireland, a separate Mutiny act was annually framed by the Parliament of that kingdom, which in all material particulars was the same with the British statute.

which

Sect. 18.

Which is annually renewed by Parliament, with such occasional amendments and alterations as to the wisdom of the legislature may seem expedient, it is declared, “That it shall and may be lawful to and for his Majesty, to form, make, and establish Articles of War, for the better government of his Majesty’s forces, which articles shall be judicially taken notice of by all judges, and in all courts whatever.”

It follows from the terms of this enactment, that no offences or crimes, against which any provision is expressly made in the Articles of War, shall be subject to any other punishment than that which is therein statuted, nor shall it be in the power of any other courts or judges, to assume to themselves a right of cognizance of any of those offences properly military, and punishable only by a military tribunal.

Section 19.

It is further declared by the Mutiny-act, “That for bringing offenders against such Articles of War to justice, it shall and may

“ may be lawful to and for his Majesty, to  
“ erect and constitute Courts-Martial, with  
“ power to try, hear, and determine any  
“ crimes or offences by such Articles of  
“ War, and to inflict penalties by sentence  
“ or judgment of the same, as well within  
“ the kingdom of Great Britain; in Jersey,  
“ Guernsey, Alderney, Sark, and Man, and  
“ the islands thereto belonging, as in his  
“ Majesty’s garrison of Gibraltar, and in  
“ any of his Majesty’s dominions beyond  
“ the seas. Provided always, that no offi-  
“ cer or soldier shall, by such Articles of  
“ War, be subjected to any punishment  
“ extending to life or limb, within the king-  
“ dom of Great Britain, Jersey, &c. for any  
“ crime which is not expressed to be so  
“ punishable by this act, nor for such  
“ crimes as are expressed to be so punish-  
“ able in any manner, or under any regula-  
“ tions which shall not accord with the  
“ provisions of this act.”

Although it follows from these clauses,  
that no crime ~~which~~ is mentioned and de-  
fined by the Articles of War, is punishable  
by

by a Court-Martial in any other manner than in that which is specially directed by those articles ; yet it does not follow that there are no crimes punishable by a Court-Martial, but such as are enumerated and declared to be punishable by the Articles of War. For it is in the power of his Majesty; at all times, to make and issue Regulations for the army, independent of those made by the Articles of War, and such regulations have all the binding force of Military law. The only limitation contained in the above clauses of the Mutiny-act is, that a Court-Martial is not competent to inflict a punishment extending, *to life or limb*, for any offence which may be declared punishable by such regulations of his Majesty, but which are not contained in the provisions of the Mutiny-act. All inferior punishments may be therefore inflicted by a Court-Martial, for any breach of his Majesty's regulations or orders respecting the army, though nothing touching the same should appear in the Mutiny-act or Articles of War.

The

The powers of a general Court-Martail are therefore various and extensive, both as to the nature of the crimes of which they may take cognizance, and of the punishments which it is in their power to decree. The several crimes are, as above observed, specially enumerated in the Mutiny-act and Articles of War, as also in his Majesty's printed regulations, which from time to time are issued from the War-office, and published and promulgated in general orders. But there are offences which admit of no precise definition, and yet which in the military profession are of the most serious consequence, as weakening and subverting that principle of honour, on which the proper discipline of the army must materially depend. Of these a Court-Martial, which is in the highest sense a court of honour, are themselves appointed the sole judges, or rather the legislators: For it is in their breasts to define the crime, as well as to award the punishment. It is declared by the Articles of War, "that whatsoever  
" commissioned officer shall be convicted  
" before



“ before a general Court-Martial, of be-  
 “ having in a scandalous, infamous manner,  
 “ such as is unbecoming the character of  
 “ an officer and a gentleman, shall be dis-  
 “ charged from our service ;” with this ne-  
 cessary proviso, “ that in every such  
 “ charge preferred against an officer for  
 “ such scandalous or unbecoming behavi-  
 “ our, the fact or facts whereon the same  
 “ is grounded shall be clearly specified.”  
 For such offences as admit of no precise  
 description, there is likewise provision  
 made in the sixth section of the Mutiny-  
 act, which declares, “ that it shall be law-  
 “ ful for Courts-Martial, by their sentence  
 “ or judgment, to inflict corporal punish-  
 “ ment, not extending to life or limb, on  
 “ any soldier, for immoralities, misbeha-  
 “ viour, or neglect of duty.”

Who are sub-  
 ject to Military  
 Law

All in pay or  
 enlisted.

The persons who are subject to Military  
 law, and amenable to trial by a Court-  
 Martial, are, in the terms of the Mutiny-  
 act, (as now expressed) “ Every person  
 “ who is or shall be commissioned or in pay  
 “ as an officer, or who is or shall be enlist-  
 “ ed

“ ed or in pay\* as a non-commissioned officer or soldier.” This would seem to include all half-pay officers, as well as officers holding commission by brevet, though receiving no pay: and it appears that the earliest Mutiny-acts comprehended all these de-

\* That the bare circumstance of being *in pay* as a soldier, was sufficient to fix the military character, so as to render the person amenable to trial before a Court-Martial, was decided by a judgment of the Court of Common Pleas, on an application to that court for a prohibition against the execution of a sentence of a general Court-Martial against Samuel George Grant, who, acting as a serjeant in recruiting for the service of the East-India Company, enlisted two drummers, knowing them to belong to the Foot Guards. Grant pleaded that he was not amenable to military law, as not being a soldier regularly enlisted and attested, though he did not deny his receiving pay as a serjeant in the 74th regiment. It was likewise ingeniously urged by his counsel, that he could only be liable to Military law while actually receiving pay, and that the last receipt of his pay did not prove that he was *actually in pay* at the time of this offence. But Lord Loughborough, delivering the opinion of the Court, decreed, that it was of no consequence whether it did appear or not that Grant was in pay at the time, “ for a person in pay as a soldier is fixed with the character of a soldier; and if he once becomes subject to the military character, he can never be released but by a regular discharge.”—*Proceedings of a General Court Martial on the Trial of Serjeant S. G. Grant, printed by Egerton, 1792.*

scriptions of persons as under the regulation of Military law ; but the inclusion of officers on half-pay and brevet officers being complained of, at a time when much jealousy was entertained on the score of the liberty of the subject, as being an unnecessary extension of the Military law, the last part of the clause, which mentioned in express words the inclusion of "officers on half-pay," was in the year 1748 omitted in the Mutiny-act, and has continued to be left out ever since. In the year 1786, after a long discussion of the question in Parliament, it was decided that officers holding commissions by brevet, though receiving no pay, were subject to the regulations of the Mutiny-act ; but that officers on half-pay did not fall within its provisions and penalties\*.

It

\* The author being misled by an erroneous report of the debate in parliament in 1786, relative to the inclusion of officers holding commission by brevet, in the description of persons subject to the Military Law, expressed an opinion in the former edition of this Essay, that *Half-pay officers* as well as

Brevet

It had formerly been a matter of doubt, whether an officer or soldier, after being dismissed or discharged from his Majesty's service, could be brought to trial before a Court-Martial, for a crime committed while he was in commission, or in pay; the terms of the before mentioned clause apparently confining the operation of the Military law to those who are actually either in commission or in pay. The point came to be solemnly determined in the case of Lord George Sackville, who, immediately on his return to England, after the battle of Minden, had been deprived by his Majesty of all military command and commission, but was not brought to trial for his conduct in that engagement till some months afterwards, in consequence of his own demand of a Court-Martial.

Or who have been so at the time of the commission of the crime

Brevet officers were included under the provisions of the Mutiny-act. He is now certified, by good authority, of this mistake; and that the legislature did not intend by their decision to comprehend half-pay officers under the description of persons liable to the Military Law. The mistake however still continues to receive countenance from the ambiguity of the terms in which that clause of the Mutiny-act is conceived.

The question was referred to the opinion of the twelve Judges, who, by their answer, unanimously declared, that “ they saw no ground to doubt of the legality of the jurisdiction of a Court-Martial in those circumstances\*.”

Troops in the  
service of the  
East-India  
Company.

The Sovereign is likewise empowered by Parliament† to frame and establish Articles of War for the regulation of the troops in the service of the East-India Company: and it is declared by the British Mutiny-act, (§. 14.), that upon the trial of any officer or soldier in the service of the said East-India Company, regard shall be had to the regulations and provisions made in the 27th year of George II. for punishing mutiny and desertion of officers in the service of the said East-India Company.

American  
Troops.

It is likewise provided by the Mutiny-act, (§ 82), that all troops raised in any of the British provinces of America, by authority of the respective governors or governments of the same, shall, while acting

\* 3d March 1760. † 27th Geo. II, c. 9.

in conjunction with his Majesty's British forces, be liable to the same Rules and Articles of War, and subject to the same trial and punishments by Courts-Martial.

It is enacted, by stat. 26th Geo. III. c. <sup>Militia</sup> 107. § 68. (an act engrossing into one law all the previous existing statutes relative to the militia), That during such time as the militia shall be assembled for the purpose of being trained and exercised, all the clauses, provisions, matters, and things, contained in any act then in force for punishing mutiny and desertion, &c. shall be in force with respect to the militia, and all officers, non-commissioned officers, and privates of the same, in all cases whatsoever; but so that no punishment shall extend to loss of life or limb. The particular regulations respecting the militia are detailed at length in the same statute. By § 88 of the same law it is enacted, that every adjutant, serjeant-major, serjeant, corporal, drum-major, and drummer of the militia, shall at all times be subject to the Mutiny-act and Articles of War; and

I 2      •

that

that it shall be lawful for the commanding officer or colonel of any regiment of militia, to direct the holding of Courts-Martial, whenever the same is embodied, for the trial of the foresaid persons, for any offence committed during the time the regiment was not embodied; under the restriction before mentioned with respect to the extent of the punishment. \*

It is further enacted by the same statute, sect. 95. that in all cases of actual invasion, or imminent danger thereof, and in all cases of rebellion or insurrection, (the occasion being first communicated to Parliament if then sitting, or if not sitting, published by proclamation), it shall be lawful for his Majesty to order the militia to be embodied, and put under the command of such general officers as he shall appoint, and to be led into any part of the kingdom: and all the officers and soldiers thereof shall, at such times, be subject to the whole clauses and provisions of the Mutiny-act, in all cases whatsoever. In such times of invasion, rebellion, and insurrection,

surrection, there is therefore no limitation with respect to the infliction of the highest punishments.

It is moreover enacted by the same statute, § 99, 'That no officer serving in the militia shall sit in any Court-Martial upon the trial of any officer or soldier serving in any of his Majesty's other forces; nor shall any officer in any of his Majesty's other forces sit in any Court-Martial upon the trial of any officer or private man serving in the militia.

Court-Martial cannot be composed jointly of militia and officers.

The regulation of the yeomanry and volunteer corps has been justly regarded as an object of much importance, and various enactments of the legislature have lately taken place on the subject. By statute 44 Geo. III. c. 54. by which several preceding acts of parliament are consolidated, it is declared, that every person enrolled in such corps of yeomanry and volunteers shall take the oath of allegiance to his Majesty; and that all adjutants, serjeant-majors, drill-serjeants, and serjeants receiving pay, and all trumpet-

Volunteer Corps.



ers, bugle-men, drummers, and farriers, receiving pay in such corps, shall be subject to the provisions and penalties of the Mutiny-act and Articles of War, and shall be liable to be tried by Court-Martial, either general or regimental, under the restriction that no punishment awarded on such persons shall extend to life or limb, except when such corps are called out in cases of invasion, or the appearance of an enemy on the coast.

By the same statute it is enacted, that in such cases of actual invasion, or appearance of an enemy, or of a rebellion or insurrection within the kingdom, all such yeomanry and volunteer corps shall be liable to march at the summons of the lieutenants of the counties within which they were formed, to all quarters within the conditions of their respective services, under the penalty of desertion; and all the officers, non-commissioned officers, or private soldiers of such corps shall, after such summons, or after general signals of alarm being made, be subject to all the provisions

provisions and penalties of the Mutiny-act and Articles of War, until the enemy is defeated or expelled, and the rebellion or insurrection suppressed.

It is by the same statute provided, that no officer of yeomanry or volunteers shall sit on Courts-Martial for the trial of any officer or soldier of his Majesty's other forces; nor shall any officer of those other forces sit on Courts-Martial for the trial of the officers or soldiers of the yeomanry and volunteer corps.

A doubt having arisen, whether persons enrolled in corps of yeomanry or volun- <sup>Volunteers may quit their Corps.</sup> teers, had a right at any time to withdraw themselves or quit their corps, the matter lately underwent considerable discussion, and some weighty authorities in point of law appeared on both sides of the question. The doubt, however, was removed by the above-mentioned statute 44 Geo. III. c. 54. which enacted, that any person enrolled in such corps might, at any time, (except when the corps was summoned upon actual service, in case of invasion,

or appearance of an enemy on the coast, or voluntarily assembled for the purpose of doing military duty under the provisions or cases specified in the act) quit the corps at his pleasure, provided he give fourteen days notice of his intention, deliver up his arms, cloaths and accoutrements, and pay up all subscriptions, fines or penalties incurred by him before quitting the said corps. It is likewise declared, that such persons thus quitting the corps of yeomanry and volunteers shall become instantly liable to be ballotted for the militia. It is likewise enacted, that if the commanding officer of such corps shall refuse under any pretence to strike out the name of such person who has thus signified his intention to resign, it shall be competent to appeal to two deputy lieutenants, or one and a justice of the peace, who shall have power to order the name to be struck out, on compliance with the above conditions.

It is the opinion of Lord Chief-Justice Hale, that *Aliens*, who, in conjunction with

with domestic traitors, endanger the safety of a state either by exciting rebellion and insurrection among its native subjects, or stir them up to individual acts of treason, are punishable by Martial law. (Hale's Pl. Cor. c. 10. 15.) This is a topic which demands some investigation. It is allowed by every writer on the Law of Nature and Nations, that although in general it is lawful in war to take all those means of annoying an enemy which nature and occasion afford, yet there are certain modes of hostile operation which the sentiments of all polished nations have agreed to reprobate as contrary alike to good policy and morality; and therefore as evidencing a baseness and treachery which removes their perpetrators from the condition of ordinary enemies. When, therefore, such persons are reduced by the fortune of war to the state of prisoners, their conduct may justify a measure of revenge or punishment beyond what is authorised to be inflicted on ordinary captives. It is not common  
to

to put to death prisoners of war. They are detained in safe custody, till they are exchanged by cartel, for an equal number of our subjects, who may be in the hands of the enemy, or till the conclusion of a peace restores them to their liberty: and in the mean time they are treated with humanity. Such is the condition of ordinary captives. If, however, the subjects of a foreign power engaged with us in warfare, shall, either after a hostile invasion of the country, or clandestinely insinuating themselves into its bosom, employ themselves when there, in stirring up the subjects to treason and rebellion against the Sovereign or government of the country, it is evident that such persons, when made prisoners, ought not to be considered as ordinary captives of war. There is no principle of justice that can condemn the forfeiture of the lives of such base and treacherous enemies: but as the humane and liberal spirit of our constitution does not allow the taking away of life without a judicial

judicial

judicial sentence, so it is customary to subject such persons, though aliens, (and as such in the general case not amenable to our laws), to trial by Court-Martial; when, the facts being substantiated by proof, that sentence is awarded which is justly due to the atrocity of the crime. The legality of such procedure has been brought into question; but no doubt can exist upon the subject, when we attend to the principles of Public Law; and in fact this very practice is a noble proof of the generous and free spirit of the British Constitution, which allows even to the basest of enemies the benefit of those safeguards of life and liberty which it assures to its natural-born subjects.

It has been questioned, whether the privilege of Parliament prevents any officer who is a member of either House of Parliament, from being put under arrest by his General, or tried by a Court-Martial. This is a subject of difficult discussion. If the privileges of Parliament were to be considered

Members of  
Parliament.

considered ~~only~~ in the light of immunities or benefits ~~personal to the~~ individual who claims them, it might with some reason be argued, that a member of Parliament, by the acceptance of a military commission, subjects himself in all respects to the operation of the Military law, and renounces his privilege of freedom from personal arrest; as it is competent to every person to renounce a benefit granted in favour of himself. But the privileges of Parliament belong to the Parliament as a body, and their dignity and independence being interested in maintaining them inviolate, it would thence seem to follow, that no individual member has a right to renounce any of those privileges, without consent of the whole body of which he is a part. General utility, however, demands, that the ordinary course of justice should not be impeded in the prosecution of crimes: and therefore it is an understood point of law, that the privilege of Parliament does not protect from arrest in cases

cases of treason, felony, or breach of the peace. With respect to military crimes, the same political expediency demands that the course of justice should not be obstructed; but as the law has not expressly warranted the suspension of parliamentary privileges in such cases, the safest course seems to be, that previously to the arrest of any member, in order to trial for a military crime, notice should be given to the House of which he is a member, with a request that, for the sake of public justice, they should consent to renounce the privilege in that instance, in so far as the body of Parliament is concerned, as the individual member is understood to have renounced it for himself, by the acceptance of a military commission. Officers under suspension.

It has likewise been made a matter of doubt, whether an officer who is under a suspension from service for a limited time, and who shall in that interval commit any crime or offence in breach of the Mutiny-act



act or Articles of War, is subject to Military law, and amenable to a Court-Martial for his conduct: But this doubt may easily be solved on a moment's reflection. Suspension, though it has the effect of depriving an officer for the time of his rank and pay, and putting a stop to the ordinary discharge of his military duties, does not void his commission, annihilate the military character, or dissolve that connection which subsists between him and the Sovereign, of whom he is a servant. He retains his commission, and is at all times liable to a call to duty, which would take off the sentence. Suspension being a punishment, is regulated in its effects by the tenor of the sentence which inflicts it, and which, as it bears no more than the temporary deprivation of rank and pay, must be limited in its consequence to those effects alone, leaving every other particular of the military character entire. The suspended officer remains, therefore, subject to the Military law, and is punishable

able for every breach thereof committed during his suspension. So likewise he may, in justification of his conduct, while he was in actual service, if he feels it impeached in the public opinion, demand an investigation by Court-Martial, as happened in the case of Lord George Sackville, who, though at the time deprived of all military employ or command under his Majesty, yet having entreated a public investigation of his conduct by Court-Martial, was allowed that benefit, which it is manifest could not have been granted to him unless he had been considered as strictly amenable to Martial law.

In the case, which has frequently occurred, of a soldier having deserted the corps in which he was first enlisted, and who, having afterwards enlisted in another corps, had deserted from the latter corps, as a doubt naturally arises, whether he can be tried for the second desertion, in respect he continues still to belong to the first corps, from which he had never obtained a discharge, it was found necessary to ob-

Deserters who have been twice enlisted.

viate

viate that doubt by an express clause in the Mutiny-act. It is therefore declared by the said act, (5. 3.) That if any person who is or shall be enlisted, or in pay as a soldier in any regiment, shall desert the same, or, while serving therein, commit any offence against this act, or against the articles of war, such person shall be liable to be tried by a court martial, and punished in like manner as if he had originally enlisted in, and of right belonged to, the same, although it shall have been discovered that he had previously belonged to some other regiment from which he had never obtained his discharge: with this proviso, nevertheless, that if he shall be claimed by his first regiment, and be proceeded against as a deserter from the same, his subsequent desertion from the latter corps in which he unwarrantably enlisted, shall be given in evidence as an aggravation of his crime; previous notice being always given that such fact is to be urged in evidence against him. .

It appears that a doubt had arisen, <sup>Artillery Officers and Soldiers.</sup> (though we cannot see upon what reasonable foundation,) whether under the aforesaid general description of persons amenable to Military law, were comprehended those who belong to the Trains of Artillery and Engineers ; since it was judged necessary to declare in express terms by the late acts for punishing mutiny and desertion,\*

“ That all officers and persons employed  
 “ in the Trains of Artillery, or the officers  
 “ serving in the corps of Royal Engineers,  
 “ or the officers and persons serving in the  
 “ corps of Royal Military Artificers and  
 “ Labourers, or the Master Gunners and  
 “ Gunners under the ordnance, shall be  
 “ within the intent and meaning of the  
 “ act for punishing mutiny and desertion,  
 “ &c. and subject to all the penalties and  
 “ punishments of the same.”

All general Courts-Martial are assembled <sup>Authority for holding Courts-Martial.</sup> under authority of the King ; either expressly signified by warrant under the royal

\* Mutiny Act, § 82.

sign-manual, or mediately, that is, by delegation of the royal authority to any general officer, having the chief command of a body of forces within any particular part of his Majesty's dominions\*, authorising him to convene general Courts-Martial for the trial of offences committed by any of the forces under his command. (See the form of his Majesty's warrant, and likewise that issued by a Commander in Chief, Appendix, No. III. & IV.)

With the appointment or constitution of the Court-Martial, the royal authority ceases till that court shall have pronounced its judgment. The King can no more interfere with the procedure of Courts-Martial in the execution of their duty, than he can with that of any of the fixed courts of Justice; nor even after the Court-Martial has pronounced its sentence, is it in the power of the Sovereign to add to or alter that sentence in any one particular, unless a recommendation to that effect

\* Mutiny-act, § 5. ✓

shall be therein contained. The King, in virtue of his prerogative of mercy, may entirely remit the punishment which the court has awarded, or by disapproving of the sentence, he may order the court to sit again, and to review their procedure and judgment; but he can no more decree any particular alteration of their sentence, than he can alter the judgment of a civil court, or the verdict of a jury. Even with regard to the power of ordering a review of the sentence, the Sovereign's powers are limited; for it is declared by the Mutiny-act, that no sentence given by any Court-Martial, and signed by the president thereof, shall be liable to be revised more than once. The Sovereign's power of sending back the sentence of a Court-Martial to the same court for their review, is founded on this *ratio*, that the sentence itself is deemed incomplete till it has received the royal sanction, or that of the person duly authorised by the Sovereign to approve of the same, and to enforce its execution.

Yet although the sentence of a general Court-Martial is not alterable by the Sovereign, or by any person to whom the Crown has delegated the power of assembling those courts, it is at all times competent to his Majesty, and entirely consistent with his constitutional authority, to remark on whatever may have been either omitted by the court, or improperly judged of by them, and which, from its blameable nature, calls for animadversion. Such remarks on the proceedings of Courts-Martial have the best effect in stimulating the care and diligence, as well as guarding the propriety and rectitude of those tribunals.

the Mutiny-  
should ex-  
pire during the  
sitting of a  
Court Martial.

As all procedure before a general Court-Martial is held in virtue of the powers vested in his Majesty by the Mutiny-act, which requires an annual renewal; so, if it should happen that during the sitting of a Court-Martial, and before a trial is finished, the Mutiny-act shall expire, it was formerly held necessary that the court should instantly cease its proceedings, and that

that after the passing of the new Mutiny-act it should be assembled *de novo*, under a new warrant from his Majesty, or the Commander in Chief empowered by him\*.

But

\* This happened during the trial of Sir George Sackville in 1760. The court, after having made considerable progress in the trial and heard the whole evidence in support of the prosecution and a part of that which was adduced in defence, was dissolved by the expiration of the Mutiny-act on the 24th of March 1760: but a new bill having passed both Houses of Parliament, and received the Royal assent the same day, the court met next morning under a new warrant from his Majesty. The Judge-Advocate General informed the court, that he had received the following opinions of the Attorney and Solicitor General, to the questions which he had submitted to their consideration.

1. The members of the court and Judge-Advocate must be sworn again.

2. The charge must be exhibited *de novo*.

3. The witnesses to be produced on the new trial must be called upon to give their testimony *in a voce*. But in case the prosecutor and prisoner are willing to save time, as the proof is taken in writing, if the depositions are read over to the witnesses, and they are sworn and confirm the same, it is sufficient.

4. As this proceeding is a new trial, independent of the former, the court is at liberty to examine the witnesses at large.

5. The prosecutor is at liberty to produce new witnesses to support the charge.

These opinions, evidently declared, that as the law then



But by the terms of the present Mutiny-act it is declared, that trials begun under a former act shall not be discontinued by its expiration, but that it shall be lawful to proceed to judgment as if the act were still in force under which the trial began\*.

Number of the  
members of a  
General Court-  
Martial.

It is enacted by the 11th section of the Mutiny-act, that no general Court-Martial shall consist of a less number than thirteen commissioned officers, except the same shall be holden in Africa or in New South Wales,

stood, the expiration of the Mutiny-act *pendente causa* had the effect of voiding and annulling the whole of the antecedent procedure, though they gave it to be understood, that provided the parties consented, the former procedure might be recapitulated, to save the time of the court. The Judge-Advocate therefore proposed to the prisoner, that the proceedings held under the former warrant should be taken as the proceedings of the new Court-Martial; and that the depositions, being first read to and confirmed by the several witnesses upon oath, should be taken as good and valid evidence in the cause. The prisoner accepted the proposal; whereupon the depositions of the several witnesses were read to them respectively, after being sworn in due form, and they confirmed their several evidences. To remedy the inconvenience of this tedious and circuitous procedure, the alteration mentioned in the text has been made in the Mutiny-act.

\* Mutiny-act, § 81

Wales, in which places such general Court-Martial may consist of any number not less than five, of whom none shall be under the degree of a commission officer.—No Field Officer can be tried in any Court-Martial, by any person under the degree of a captain.

It is in all cases proper that there should be more members appointed than the *minimum* required by the statute, to guard against the accident of members falling sick or dying, or being found disqualified, and therefore it is customary to appoint fifteen or seventeen members to compose the court. It is proper that the number should be unequal, to avoid an equal division. If, however, by the death or necessary absence of a member of a Court-Martial, which originally consisted of an unequal number, the court should be equally divided in opinion, the side on which the president gives his vote must be understood to have decided the question, which in effect, is giving the president,

who in all cases is entitled to vote, a double voice in that particular emergency.

It is declared by the 12th section of the Mutiny-act, that no sentence of death shall be given against any offender by any general Court-Martial, unless *nine* officers present concur therein, where the Court consists of thirteen ; and two thirds of the number present, where the Court consists of more than thirteen. The concurrence of two thirds in every capital sentence, is likewise requisite in Courts-Martial held in Africa or in New South Wales, consisting of a lesser number than thirteen members.

It would seem that the above-mentioned section of the Mutiny-act has been very carelessly considered by some writers on the practice of Courts Martial, otherwise it could never have been stated as a question whether those members whom they term *supernumerary*, as being above the legal *minimum* of thirteen, had a right to take part in the deliberations, and to give their votes along with the other members of the court ; far less could the question  
have

have been answered, as some of those writers have resolved it in the negative, that such members have no right to give their opinions or votes. Such statements are the result of gross inattention. The above section leaves no room for a doubt. The law has wisely regulated the *minimum* of the numbers of a Court-Martial, but has left the *maximum* altogether discretionary to the Sovereign, or to the person whom he invests with the power of appointing it; and if instead of thirteen members, it shall be his pleasure that the court shall consist of double or treble the ordinary number; every individual of that number must be sworn a member, and is by law invested with the same deliberative and judicial powers as his fellows\*.

The

\* I have been the more explicit on this point, that I have found the error very genicral among military men, and it is a painful consideration to reflect that Courts Martial may have been held on that erroneous principle, and sentences even of a capital nature pronounced by such illegal tribunals. Let the case be put that a Court-martial is appointed to consist of fifteen members. According to this doctrine, the two youngest  
of

Quality of the  
members of a  
general Court-  
Martial.  
The

The president of every general Court-Martial must be a field-officer, unless where a field-officer cannot be had; but in no case whatsoever, can he be under the degree of a captain; Mutiny-act, § 11. By the same section of the Mutiny-act it is enacted, that the president of a general Court-Martial shall not be the commander in chief, nor governor of the garrison where the offender is to be tried. The reason of this disqualification is probably, that the commander in chief, or governor of the garrison, may often be the person under whose authority the court is held, and who has a delegated power from his Majesty to approve, and order into execution

of that number have no right to vote; and of the *thirteen* other members, *nine* give their voices for a capital punishment, and sentence is pronounced, and the prisoner suffers death. Had the court consisted of its appointed number of fifteen, as indisputably by law it ought to have done, and no more than *nine* of that number had voted a capital punishment, the life of the prisoner must have been saved; for *two-thirds*, as by law required, had not concurred in the sentence. The prisoner's condemnation was therefore contrary to law, and his life was sacrificed, through the error and inattention of his judge.

tion, or suspend the sentences of Courts-Martial called by his authority. He therefore having the power of review, it would be improper that he should be a member of that court whose sentences he is authorised to review\*.

\* In the trial of Macallum, Scrymgeour, Malloch, and others, for mutiny, before a general Court-Martial held in Edinburgh Castle in January 1795, by warrant of General Lord Adam Gordon, commander of his Majesty's forces, castles, forts, &c. in North Britain; an objection was stated against the president of the court, Colonel Hugh Montgomerie, that he was Lieutenant-Governor of Edinburgh Castle, the garrison where the court was held. It was answered on the part of the Crown: All disqualifying clauses must be strictly interpreted: the Earl of Eglintoun was governor of the Castle of Edinburgh; the president of the Court-Martial was only Deputy, or Lieutenant Governor; to the latter, therefore, the disqualification did not apply. The court repelled the objection. It was peculiar however to this case, that the objection was not stated, as it ought to have been, *in limine* of the proceedings, but reserved till the trial was closed. The prisoners had been judicially asked at the opening of the court, whether they had any objection to any of the members of the Court-Martial, and they had declared they had none; they had therefore homologated the jurisdiction, by pleading not guilty, and by standing their trials. This circumstance might have weighed with the court as an additional reason for repelling the objection.

With

Ordinary  
Members.

With respect to the ordinary members of a general Court-Martial, as the provisions of the Mutiny-act extend both to the land forces and marines, so it is declared, that in matters wherein any of his Majesty's marine forces may be interested, the officers of the marines shall be associated with officers of the land forces, for the purpose of holding Courts-Martial; and that the members of the court so composed, shall take their rank according to the seniority of their commissions in either service\*. In like manner, it is provided, that when any of his Majesty's land forces are employed in the East Indies, Courts-Martial may be there assembled, composed jointly of the officers in the service of the United East India Company, and of his Majesty's land-forces; with this distinction, that when the trial is of any officer or soldier of the said land-forces, regard shall be had to the regulations of the British Mutiny-act; and when the trial is of an officer or soldier in the service of the East

\* Mutiny-act, § 13.

India Company, regard shall be had to the Mutiny-act passed for the punishment of offences committed by officers or soldiers in the service of the said Company\*.

A general Court-Martial is, as before observed, held, either by direct authority from his Majesty under the royal sign-manual, or by the authority of a commander in chief, having powers for that effect. In the former case, of a Court-Martial assembled under the direct authority of the King, the warrant usually contains the names of the president and whole members who compose the court †; and it is directed to the Judge-Advocate General or his deputy. In the latter case, where the court is assembled by delegated authority, the president alone is appointed by name, by a separate warrant addressed to himself, signed by the commander in chief, and orders are issued by the same autho-

Authority  
holding C.  
Martial.

\* Mutiny-act, § 11.

† See appendix No. III. It is not, however, always the case, that the members of the court are named in warrants under the sign-manual



city, for certain regiments to furnish each a certain *quota* of officers of a specified rank to be members of the court, and to return their names to the office of the Adjutant-General; thus leaving it to each regiment to choose the most proper persons for that important duty.

The Court  
subsists till it  
is dissolved

The Court-Martial once constituted by proper authority, remains in existence till it is dissolved by the same authority which created it. The members, therefore, though the whole business is exhausted by their pronouncing sentence on the trials brought before them, are not at liberty to return to their ordinary duty, or leave the place where the court is assembled, without special permission of the commander in chief, till the court is finally dissolved. It may be necessary for the court to revise its sentence, or they may be required to intimate his Majesty's pleasure thereon, or that of the commander in chief, to the parties in open court.

Whether it can  
judge as to its  
own competency.

A general Court-Martial, assembled by special warrant, for the trial of a particular person named in that warrant, must discharge

charge their duty, by taking cognizance of the crime, and pronouncing sentence, either of condemnation, or of acquittal from the matter of charge. It has been doubted whether it is competent to a court so constituted, to exercise any judgment as to the legality of the trial, or the amenability of the prisoner to their jurisdiction. The naval Court-Martial appointed to try Captain Norris in 1744, for misbehaviour and cowardice in the sea-fight off Toulon, thought proper to avoid giving any sentence either of condemnation or acquittal, by determining that they had no right to take trial of the charge, as the accused person had previously given up his commission, and was not in his Majesty's pay; although Captain Norris himself had desired a Court-Martial, which had accordingly been granted to him. The proceedings of the court were called for in the House of Commons, and referred to a committee, on whose report a motion was made and passed, that those proceedings were arbitrary and illegal. Yet there would  
seem

seem to be little doubt, that if the objection to the legality of the trial is self-evident and insurmountable, the court may suspend procedure till the objection is canvassed by the proper authority ; as, for example, if the prisoner is not subject to Military law, or if the crime should be a civil offence, as murder, high-way robbery, rape, &c. falling under the cognizance of the ordinary municipal courts.

The Court  
must discuss  
the whole  
charges.

A Court-Martial must exhaust the whole charges that come before them, either by separate opinions and judgment upon each separate article, or, where the several charges are connected, and form all together one offence, by a sentence referring to the whole. It is not competent for the court, after taking trial of one or more of the articles of charge, and pronouncing sentence on them, even though that sentence should award the *ultimum supplicium*, Death, to wave, on that account, the discussion of other articles of charge that remain. The Court-Martial on the trial of Lieutenant-Colonel Cawthorne in  
1796,

1796, on fourteen different articles of peculation and malversation in duty, after finding the prisoner guilty of six of the most material of those charges, and pronouncing sentence accordingly, adjudging the prisoner to be cashiered, and declared incapable of serving his Majesty in any military capacity, reported their sentence to the King, as humbly conceiving that the ends of public justice might thereby be satisfied; and they submitted it to his Majesty, whether he might not think it unnecessary to investigate the remaining eight of the charges, which were of a nature similar to that of the others which they had investigated. His Majesty issued his commands to the court, to proceed to examine and pronounce sentence on all the remaining charges. It is of importance to the public, that every thing which has been made a matter of criminal accusation, should undergo a solemn decision by the proper tribunal, that it may have effectual operation in guarding others from falling into similar practices.

The necessity of examining and discussing the whole articles of charge which are brought before a Court-Martial, does not preclude their exercise of judgment on the relevancy or irrelevancy of those charges, or on their competency to become the subject of trial. It frequently happens, when charges are brought by a private prosecutor, involving the consideration of various articles of alleged misconduct or malversation, that the prosecutor, either from over anxiety or error in judgment, specifies certain matters as articles of charge which a Court-Martial may judge to be of a nature entirely blameless; and that although proved, or acknowledged by the prisoner, they infer no criminality. In such a case, it is the duty of the court to dismiss those particular articles of the charge altogether, and throw them out of their consideration, as *irrelevant*. In like manner, where a charge, however criminal in its nature, appears, either from self-evident circumstances, or from facts emerging in the course of the trial, not to attach upon the  
partv

party accused, it is the duty of the court to wave all examination into the subject, as being foreign to the person of the prisoner, and to declare so by their sentence.

The members both of general and regimental Courts-Martial, when belonging to different corps, take the same rank which they hold in the army; officers of equal rank taking place according to the dates of their commissions. In Courts-Martial composed partly of officers of the regular and partly of fencible corps, the latter, as before observed, are on the same footing with the former; precedence being determined between them solely by the rank of the commission, and where that is equal, by priority of date. Officers having brevet commissions prior in date to those of the regiment in which they actually serve, may take place in Courts-Martial composed of different corps, according to the rank in their brevets; but in Courts-Martial held by their own regiment, they take rank only according to their commission in the

Precedence among members of the court.

L 2 †

regiment.

regiment. See the 15th section of the Articles of War, entitled *Rank*.

In Courts-Martial held in the East-Indies, and jointly composed of officers of the regular British forces, and of those in the service of the East-India Company, the former have the precedence of the latter when their rank is equal, though the commissions of the East-India Company's officers should be of older date. *Articles of War, sect. 22. art. 2.*

Time of sitting.

Courts-Martial are not by law allowed to sit longer than seven hours a-day; and no court can be assembled before eight o'clock in the morning, or sit later than three o'clock in the afternoon, unless in cases which require an immediate example. *Articles of War, sect. 16. art. 9.*

Advantages of the mode of trial by Court-Martial.

The mode of trial by Court-Martial possesses all the benefit of trial by jury, and has moreover some advantages that are peculiar to itself. It has been frivolously urged, that the essence of the trial by jury, being that every man shall be tried

by

by his peers or equals, non-commissioned officers and private soldiers, when tried by a Court-Martial, have not that benefit, as the Mutiny-act declares that no member of a Court-Martial shall be under the rank of a commissioned officer. But in truth this objection is founded entirely in a misunderstanding of the meaning of the words, "*trial by peers.*" By this expression it is not meant that the persons who compose the court should be, in every respect, of the same rank and station in life with the party who is to be tried, for this would in some cases be an unattainable requisite, and in many would be attended with much disadvantage, instead of benefit, to the party accused. Some stations are so low, and so peculiarly characterised, that a jury of those who were literally the peers, or of like condition with the prisoner, could not be assembled, nor would their character admit of their sitting in judgment on the life of a fellow-creature. The true meaning of a *trial by peers* is, that those who compose



the jury are men, who, from their rank in life, have no privileges beyond what are enjoyed by the criminal whom they are to try; who are subject to the same laws with himself, and are therefore under no bias or temptation to stretch them to his prejudice. The Military law, as contained in the Articles of War and Mutiny-act, regulates alike the conduct of the highest commissioned officer and the private soldier. The former is under no temptation to stretch or pervert that law to the prejudice of the latter, because its sanctions are alike explicit as to the duties of both; and the higher has no interest or advantage in abridging the privileges of the lower, but on the contrary a natural incitement to maintain their common rights.

The votes of a majority are decisive.

Among the peculiar advantages of the mode of trial by Court-Martial, may be reckoned this, which is essential to its judgements, that they are the result, not of unanimous concurrence of the opinions of all the jurors, but of a majority of them in cases where the punishment does not affect

affect the life of the criminal; and in capital cases, of nine out of thirteen, or two thirds of the jurors where the number exceeds thirteen. Where unanimity is requisite, it is evident that in all cases of difficulty there must be a concession of the right of private judgment, and an implicit acquiescence in the sentiments of some leading members of the jury; otherwise matters could never be brought to an issue. But this concession must often be attended with the violation of the dictates of conscience to individuals; and in cases where an individual, either from scruple of conscience or a worse motive, refuses to make that concession, an iniquitous verdict must be the consequence\*. In the sentences of Courts-Martial, no concession of the right of private judgment is necessary. All the members of the court have their unbiassed judicative power; and even the influ-

\* Some of the most judicious writers on the English law have reprobated this peculiarity of the constitution of the trial by jury. See Mr. Emlyn's excellent preface to the State-trials.

ence of opinion is guarded against as far as possible, by the order in which the opinions and votes of the members are given; the youngest member of the court being required to give his opinion first, and the rest following in progressive seniority up to the president, who votes last.

The evidence must be reduced into writing.

It is likewise a material advantage of the trial by Court-Martial, that the whole evidence is accurately taken down in writing, in presence of the members of the court, who may at all times resort to the written proceedings, which in the close of the trial, and before sentence, are commonly read over to them, and compared with and corrected by their own notes taken during the trial; so that every one of the jurors must be completely master of the whole body of the evidence.

The Court may adjourn from time to time.

Nor is it a small advantage of this mode of trial, that the court being obliged by law to regularly adjourn its proceedings from day to day at an early hour, and even having

having that privilege at any hour, and for any reasonable space of time, when deliberation is thought requisite, the attention of the members can never be harassed or worn out, nor their judgment precipitated or rashly formed: it must in all cases be the result of calm, attentive, and mature deliberation.

The Martial or Military law, as contained in the Mutiny-act and Articles of War, does, in no respect either supersede or interfere with the civil and municipal laws of the realm. On the contrary, it is expressly declared by the Mutiny-act, section 6, that nothing in that statute shall extend or be construed to exempt any officer or soldier whatsoever from being proceeded against by the ordinary course of law. Hence it appears that soldiers are equally with all other classes of citizens, bound to the same strict observance of the laws of the country, and the fulfilment of all their social duties, and are alike amenable to the ordinary civil and criminal courts of the country, for all offences against

The Military law does not interfere with the civil;

against those laws, and breach of those duties. It follows, therefore, that no crime for which the common or statute laws of the country have provided a punishment, is cognizable before a Court-Martial; nor can the military power interfere to prevent the punishment of any soldier guilty of such offences, or supersede, by any judicial procedure in a Court-Martial, the ordinary effect of the laws of the country; unless in those extraordinary emergencies, when the legislature may find it necessary to proclaim Martial law for the suppression of rebellion, and to declare *per expressum*, that all crimes and offences committed in furtherance of such rebellion, shall be tried in a summary manner by Courts-Martial, notwithstanding the ordinary courts of justice may at the time be open; a remedy of the most violent nature, and justifiable only by that absolute necessity of circumstances, when the *salus populi* becomes the *suprema lex*\*.

The

\* See Chap. XI. and in the Appendix No. VI. the statute for

The Military law is in ~~fact~~ so much subordinate to the civil, that the military power is expressly required to give its aid for carrying the civil laws into execution. The Mutiny-act\* decrees, That if any officer, soldier, &c. shall be accused of any capital crime, or any offence against the person, estate, or property of any of his Majesty's subjects, which is punishable by the known laws of the land, the commanding officers of all regiments, troops, or parties, are required to use their utmost endeavour to deliver over such accused person to the civil magistrate, and to assist the officers of justice in apprehending such offender; and this under a most severe penalty in case of refusal to give such aid, no less than being *ipso facto* cashiered, and declared incapable of holding any civil or military office within the kingdom.

But is required to give it aid

It is provided at the same time†, that no person who is acquitted or convicted of

for the enactment of Martial law in the kingdom of Ireland, on occasion of the late rebellion, (anno 1798.)

\* Mutiny-act, § 16. † Ibid, § 10.

any capital crimes, violences, or offences by the civil magistrate, shall be liable to be punished by a Court-Martial for the same, otherwise than by cashiering. This exception is wisely introduced for guarding the purity of the military character. It is not to be thence inferred, that a criminal tried and convicted by the civil power, is to be tried a second time by a Court-Martial for the same offence; but upon proof being brought of his conviction of a crime before the civil court, which renders him unfit for or unworthy of the honourable profession of a soldier, he may on that ground be cashiered or dismissed from his Majesty's service by a Court-Martial.

On the other hand, the sentences of Courts-Martial are entitled to have their full effect and consequences in judgment in the same manner as the decisions and awards of the King's ordinary courts of justice. The Mutiny-act declares\*,  
“ That the Articles of War established by

\* Mutiny act, § 18. &c.

“his Majesty shall be judicially taken  
“notice of by all judges, and in all courts  
“whatsoever;” and this enactment is without doubt extended to all sentences of Courts-Martial pronounced in conformity to those articles.

The Civil power will likewise lend its aid to supply any deficiencies in the powers of Courts-Martial, where the end is the proper enforcement of military discipline and jurisdiction. Thus, for example, as the military jurisdiction does not extend to enforce the appearance of witnesses who are in a civil line of life, or to compel them to give their attendance in a Court-Martial, they will, in case of refusal to obey the summons of the Judge-Advocate, be cited or subpoena'd for that purpose by the civil magistrate, on application by petition from the Judge-Advocate, setting forth the necessity of the case, and the importance of their testimony to elucidate the matters to be tried\*.

And is aided  
by it in its turn.

The civil power likewise gives its assist-



ance to the military in the apprehending of deserters, it being declared lawful for the constable, head-borough, or tything-man of any town or place, to apprehend, or cause to be apprehended, any person reasonably suspected to be a deserter, and to bring him before a justice for examination; when, if, either by the party's confession, or by the testimony or oath of one or more witnesses, or ~~the~~ justice's own knowledge of the fact, the suspected person is found to be an enlisted soldier, the justice is authorised to commit him to gaol, and give notice thereof to the Secretary at war, that he may be proceeded against according to law\*. Any justice of the peace may likewise issue his warrant for the payment of a reward for the apprehending of deserters, out of the land-tax money of the parish in which he is apprehended†: and heavy penalties are enacted against all who conceal deserters, assist their escape, or receive, buy, or exchange their arms or clothes‡.

Mutiny-act, § 67.

† Ibid. § 68. . . ‡ Ibid. § 69½

Moreover, it is declared by the Mutiny-act, Sect. IX. That if any offender, under sentence of death by a Court-martial, shall obtain his Majesty's pardon, under condition of transportation for life, or a term of years, all the laws now in force, touching the escape of felons under sentence of death, shall apply to such offender, and to all persons aiding, abetting, or assisting him to make his escape; after due notice has been made by the Judge Advocate General to any of the Justices of the Courts of Westminster, of his Majesty's pleasure regarding such offender, and an order has been given by any of the said Justices, for his transportation.

In the case which frequently happens, of soldiers absent on furlough falling sick or meeting with any unavoidable casualty, which prevents their return to their regiment within the time of their furlough, whence they might become liable to the penalty of desertion, it is declared by the Mutiny-act, to be competent to any justice  
tice

tice of the peace to grant an extension of furlough to such soldiers on due enquiry, which shall be sufficient to protect them from being apprehended or otherwise molested on the score of desertion, while that renewed furlough is in force.

So far, therefore, from there being any hostile interference between the civil and military powers of the state, we see it wisely provided, that the most perfect *comitas* and harmony shall subsist between them; and the provinces of each being distinctly defined, they are each required to lend an amicable aid to the other in carrying their proper jurisdiction and authority into full effect.

Time limited  
for the prosecution  
of offences.

The Military Law, while it authorises every measure necessary for the punishment of offenders, is most strictly watchful to obviate every possible means of oppression, and to guard the administration of justice from every taint of malice or of private resentment. The Mutiny-act, therefore, with equal wisdom and humanity,

manity, provides\*, that offences which, at the time of commission, have been deemed of too slight a nature for prosecution, shall not, at any distance of time, when the evidence of exculpation or alleviation may chance to be weakened, be urged as matter of arraignment against the offender, by declaring in express words, that “no person shall be liable to be tried and punished for any offence against any of the said acts or Articles of War, which shall appear to have been committed more than three years before the issuing of the commission or warrant for such trial ; unless the person accused, by reason of his having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period :—in which case he shall be liable to be tried at any time, not exceeding two years after the impediment shall have ceased.”

Indeed material justice requires, that all offences should become the subject of in-

\* Mutiny-act, § 82.

investigation and trial as speedily as possible after the time of their commission; nor is it consistent either with candour or with equity to pass over in silence the first slight deviations from duty, arising perhaps from ignorance or inexperience, thus tempting the incautious offender to greater enormities, and afterwards to bring the former in aggravation of his guilt; or even, as has been too frequently done, to make them parts of one accumulated charge against him. A procedure of this kind can receive no apology from the affected plea of humanely overlooking slight offences; for these offences, if so trivial as to merit no animadversion at the time, ought to be forever buried in oblivion, not treasured up for a future day of account; and if considerable enough to merit notice or censure, it is blameable in no mean degree to overlook them\*.

The

\* Of a procedure of this kind, which had occurred on two trials held at Edinburgh in March 1798, viz. that of Captain John Cameron, and Captain and Adjutant John Roy, on a variety of charges, the King expressed his pointed disapproval.

The sentence of a Court-Martial, like that of every subordinate judicature, is subject to review, and may be appealed from by the party who conceives that he has suffered injustice. No sentence of a Court-Martial is indeed complete, till it has been approved of by his Majesty, or by a commander in chief having that authority delegated to him by special commission. The appeal from the sentences of Courts-Martial lies to the supreme Civil courts of law, as the courts of King's Bench and Common Pleas in England and Ireland\*, and

The sentence of a Court-Martial is subject to review and p  
tion

tion in the following terms after approving entirely of the sentences of the Court-Martial "His Majesty, adverting to what "has been the measure appeared in the course of both these "in which is expressed his extreme disapprobation of keeping "them as must an officer or soldier in reserve until they "shall have accumulated, and then bringing them before a "martial Court-Martial collectively, where is every charge "could be preferred at the time when the act or facts on "which it turns are recent, or if knowingly passed over, "ought not, either in candour or in justice, to be in future "brought into question."

Instances are frequent, of prosecutions brought in the civil courts against the members of a Court-Martial on the ground of an unjust sentence. Anon 20 hies. 5th Advoca  
mentions

and the Court of Session in Scotland\*. It has likewise been supposed, that the proceedings of Courts-Martial are subject to review in either of the Houses of Parliament: for in a debate in the House of Commons on the Mutiny-bill, an amendment being proposed to that clause of the oath to be administered to the members of a Court-Martial, binding them not to discover the opinion or vote of any particular member, "unless required to give evidence as a witness by a court of justice," by

mentions the following. "In 1743, a lieutenant of marines was tried by a Court-Martial on board the Oxford man of war, in Port Royal in Jamaica, for disobedience of his captain's orders, condemned to suffer an imprisonment of fifteen years, and rendered for ever incapable of his Majesty's service. The evidences brought against him were the depositions of a parcel of illiterate people, reduced into writing several days before he was brought to trial, which persons were entirely unknown to him, he having never seen them, or heard of their names before: and upon his objecting to the evidence, he was brow-beat by the court, and loaded with curses and imprecations. For which illegal proceedings, upon his return to England, he brought an action in the court of common pleas, (the sentence had been previously remitted by the King), and obtained a verdict against the members of the Court-Martial for 1000*l.* of damages." *Adlyc on Courts-Martial*, p. 64.

\* Mutiny-act, § 79.

adding to it these words, “ or in both “ Houses of Parliament ;” the amendment was rejected, on the ground, that they were virtually included under the denomination of *courts of justice*. But as the clause of the Mutiny-act authorising redress against the sentences of Courts-Martial specifies only the courts of record, under which denomination are generally understood to be comprehended only the King’s ordinary Courts of justice, and the House of Commons is in no sense to be considered as such : it would seem that the above opinion is ill founded. Nor is there any example of such judicative power being exercised by the House of Commons. The proceedings of general Courts-Martial have indeed been called for in that House, and have been censured as *arbitrary* and *illegal* ; but there is no instance of the

\* The proceedings of a Naval Court-Martial held in they ar 1745, for enquiring into the conduct of Captain Norris, were made the subject of discussion in the House of Commons, and were censured, as *partial, arbitrary, and illegal*, April 30, 1745.



reversal of any sentence by it as a court of justice, or award of damages for illegal proceedings. It may indeed be maintained with more plausibility, that the *House of Lords*, as the supereminent court of appeal, has the power of reviewing the sentences of Courts-Martial, as well as those of all other courts of judicature within the kingdom; but we know of no instance where in practice this appeal has been directly brought from the judgment of a Court-Martial: and the safest course for any party feeling himself aggrieved by the sentence of the military court, would be, to follow the mode pointed out by the Mutiny-act, by bringing a writ of error in the court of King's Bench in England or Ireland, or a suspension in the Court of Session in Scotland; from the judgment of which courts, the ultimate appeal is competent to the House of Lords. This procedure is no contradiction of that clause of the Mutiny-act which declares, that “no sentence of a Court-Martial  
‘ signed by the president thereof, shall be  
“ liable

“ liable to be revised more than once ;” for that clause only debars the revisal of such sentence more than once by the same or any other Court-Martial.

The causes for which the sentence of a Court-Martial may be brought under review of a superior judicature, are the same which, in the Civil courts of England, authorise either the granting of a new trial, or an arrest of judgment ; that is to say, if the sentence or verdict shall have been manifestly without, or contrary to evidence ; or if it shall have been contrary to, or unauthorised by law ; if the penal award be beyond measure exorbitant or severe ; if the jury or judges have been corrupted, &c. But in all such cases, as the presumption is strongly in favour of the judgment, the superior court will not entertain the appeal, or authorise any review of the proceedings, unless on the most pregnant or positive grounds for supposing that the merits have not been fairly discussed, and that the decision is

not agreeable to the justice and truth of the case\*.

The sentences of a Court-Martial may likewise become the subject of prohibition, and be arrested in their execution, by interference of the King's Civil courts, on the ground of the Military court having exceeded its jurisdiction and powers; as if, for example, a Court-Martial shall have tried and condemned, for a military offence, a person not subject to the Military law. This excess of jurisdiction appears to be the only legal ground on which a prohibition can be issued; for it is, no ground of prohibition, that a court has decided wrong in a matter clearly within its jurisdiction, although such decision may be a just ground of appeal, or a sufficient foundation for a review of the sentence†.

As

\* Blackstone, b. iii. c. 24.

† This is a point of some difficulty, and on which the law-authorities are not entirely agreed. Sir William Blackstone (book iii. c. 7.) holds, that besides the ground of excess of jurisdiction

As no sentence of a general Court-Martial is complete until it has received the <sup>The King may order a revision of the sentence</sup> approbation

jurisdiction, it is a sufficient foundation for a prohibition, that a court, in handling matters clearly within their cognizance, have transgressed the bounds prescribed to them by the laws of England; "as where they require two witnesses to prove the payment of a legacy, a release of tithes, or the like," in such cases a prohibition (says he) will be awarded. But this opinion is powerfully controverted by Lord Toulborough, in delivering the judgment of the Court of Common Pleas, in the celebrated case of *Serjeant Grant*, condemned by a general Court-Martial in 1792, for having been instrumental in detaching two men for the service of the East India Company, knowing them to be soldiers in the foot-guards. After stating two species of excess of jurisdiction which may be legal foundation for a prohibition, his Lordship thus proceeds. "Beyond these two grounds it does not occur to me that any other ground can be stated upon which the courts of Westminster Hall can interfere in the proceedings of other courts, where the matter is clearly within their jurisdiction; that they have decided wrong may be a ground of appeal, it may be a ground of review, but not a ground of prohibition. That has been distinctly laid down both in this court and the court of King's Bench, with respect to the court of prize, and it is unnecessary to quote authorities upon it, which leave it without a contradictory opinion. With respect to the matter of evidence, where the courts proceed upon the admission of evidence that could not be admitted in a court of law, or in mitigation of evidence that would be admitted in a court of law, the 12th article of the complaint against the judges in the reign

approbation of his Majesty, or of the commander in chief to whom that power has been specially delegated, the King, or such commander, disapproving of the sentence, may order the court to reconsider or review their proceedings, and recommend to them an alteration of their judgment ; but as it is not consistent with the royal powers, under the British constitution, actually to exercise any judicial authority, which belongs alone to the courts of justice ; so his Majesty, as before observed,

“ reign of James I. and the answer to that article of complaint,  
“ makes distinctly the law upon that subject. The 12th article  
“ of complaint is, that the courts have granted prohibitions, to  
“ the ecclesiastical court, upon the ground, that the ecclesi-  
“ astical court would not allow the testimony of a single witness,  
“ to be sufficient in cases where, in the common law-court, the  
“ testimony of one witness would be sufficient : and their inter-  
“ ference in it is the subject of complaint. The answer the  
“ judges made to it is, that in matters subject to the exclusive  
“ jurisdiction of the ecclesiastical courts, as the setting out of  
“ titles, proofs of a legacy, and proofs of marriage, the courts  
“ do not prohibit, though the rule of the ecclesiastical court  
“ requires more evidence than the common law does to estab-  
“ lish the fact : but that where incidentally a matter comes be-  
“ fore them, there the court, upon such a surmise, will grant a  
“ prohibition.”

can

can neither himself make any alteration on the sentence of such courts, nor commit that power to any other. All, therefore, that is competent for his Majesty to do, if the sentence of a Court-Martial shall not meet with his approbation, is to order the court to revise their proceedings: and even this power, as above said, is limited; for the Mutiny-act declares, “that no sentence given by any Court-Martial, and signed by the president thereof, shall be liable to be revised more than once’.”

By the constitution of Great Britain, the King has the power of pardoning or remitting the sentences of Courts-Martial, as of all other courts of justice. This branch of the royal prerogative is founded upon this *ratio*, that as the King represents the body of the public, and possesses by delegation all its powers and rights with regard to the execution of the laws, all breaches of the public law are considered as personal offences against the So-

The King's  
power of par-  
doning

\* Mutiny act, § 7

vereign ; to whom therefore it belongs of right to pardon offences committed against himself : and as it is not competent for any court by its own authority to dispense with the rigour of positive laws, however strongly the particular circumstances of a case may plead for such dispensation ; so it is of the utmost consequence for the ends of justice, that an equitable power of this kind should be lodged with the chief magistrate, from whose hands it is likely to be issued with the least hazard or suspicion of partial or impure motives. “ It is (as Sir “ Wm. Blackstone well remarks) one of the “ great advantages of monarchy above any “ other form of government, that there is a “ magistrate who has it in its power to extend mercy wherever he thinks it is “ deserved, holding a court of equity in “ his own breast, to soften the rigour of “ the general law in such criminal cases as “ merit an exemption from punishment\*.” The King’s pardon may either be granted *simply*, which gives a complete discharge

\* Book iv. chap. 31

and immunity from the punishment decreed ; or *conditionally*, which operates a commutation of a capital sentence, or one inflicting a very high measure of punishment, into a milder. Of the latter we have daily examples in the case of felons who have received a capital sentence, to whom the royal pardon is extended, on condition of transportation to some of the colonies and plantations, either for life or for a term of years : and the King's pardon is in like manner frequently granted to deserters condemned to death by a Court-Martial, on condition of their enlisting in certain regiments 'stationed abroad'.

The

\* If the reasoning above detailed is solid, and the doctrine regarding the Crown's right of pardoning either simply or conditionally, is legal and constitutional, we must with submission intimate a doubt of the propriety of a clause recently inserted in the Mutiny Act, Sect. V which declares, " That in  
 " all cases wherein a capital punishment shall have been awarded by a Court-Martial, it shall be lawful for his Majesty, instead of causing such sentence to be carried into execution,  
 " to order the offender to be transported as a felon for life, or  
 " for a certain term of years, as to his Majesty shall seem  
 " meet,



The royal pardon is frequently extended to those who are condemned by a general Court-Martial, in consequence of a recommendation to mercy contained in the sentence of the court; who, although they may have found themselves obliged by a sense of duty, or in consequence of

“ meet, and if the person so transported shall return without  
 “ leave before the expiration of the term, he shall suffer death  
 “ as a felon, without benefit of clergy.” To declare by an  
 enactment of the legislature, that any particular act ordered  
*shall be lawful*, leads to this inference, that antecedently to  
 such enactment, and independently thereof, such act or deed  
 was either confessedly illegal, or at least that its legality was a  
 matter of doubt. But the right of the Sovereign to extend  
 his mercy in the pardoning of offences, either to a total and  
 absolute remission of the punishment, or to a partial remission,  
 or a commutation of a severer penalty into a milder, was never  
 accounted a subject of question. It stands on the basis of the  
 most indisputable legality, for while the power of granting  
 an absolute pardon is acknowledged as the constitutional pre-  
 rogative of the crown, it follows of necessity, on the principle  
*Quod cum magis continet in se minus*, that the same power  
 which can remove the rigour of the law altogether, and in its  
 most extent, can mitigate that rigour in any interior degree;  
 and that the person who at pleasure can grant or refuse a be-  
 nefit, has at liberty to annex to the grant whatever condition  
 may to him seem just and reasonable. For express authori-  
 ties on this subject, see Blackstone, 3 IV. ch. 31 — 2 Haw-  
 kins. P. C. 94

the

the strict letter of the law, to pronounce a penal sentence, may yet be of opinion that there are alleviating circumstances in the case which render the prisoner a proper object of the royal clemency. In such case, the recommendation of the court is generally founded on the mention of those favourable circumstances\*. But in all cases whatsoever, the Sovereign has it in his power to grant either a conditional or a free pardon whenever it shall seem good to him, though there should be no recommendation from the court to that effect.

When the Court Martial is held under the authority of a commander in chief who is authorised by the King to confirm and cause sentences to be carried into execution without making a previous report thereof, or to suspend them at his discretion, it is proper that every recommendation in favour of the person tried, whether for a mitigation of punishment, or for an entire remission of the sentence, should be made to such commander, requesting that he will (in his discretion) solicit his Majesty's clemency.

## CHAP. III.

*Of Regimental and Garrison Courts-Martial*

COURTS-MARTIAL are either *general*, for the trial of the greater military crimes, or *regimental* or *garrison*, for the cognizance of smaller offences.

Regimental  
Courts-Martial.

The Articles of War provide, that the commissioned officers of every regiment may, by the appointment of their Colonel or commanding officers, hold regimental Courts-Martial, for the enquiring into such disputes or criminal matters as may come before them, and for the inflicting of corporal punishments for small offences, and shall give their judgment by the majority of voices.

The Articles of War likewise de-

Art. of War, § 16. art. 11.

clate.

clare\*, that no regimental Court-Martial shall consist of less than *five* officers, excepting in cases where that number cannot be conveniently assembled, when *three* may be sufficient.

Where a sufficient number of officers <sup>Member</sup> of the same corps or regiment cannot be had, the commanding officer, or the governor of the garrison, may appoint officers from different corps to compose the regimental Court-Martial. The Articles of War and Mutiny-act contain no instruction or regulation with respect to the rank of these officers; but the usual practice is to appoint a Captain as president, and four subalterns, (or two, if more cannot be conveniently assembled.) And in order that this duty may be equally shared, and all have the benefit of this necessary school of instruction; it is customary in every regiment for the adjutant to keep a regular roster for this as well as for all other regimental duties. The adjutant himself is frequently put

\* Articles of War, ~~13~~ art. 12

† Ib art 13

upon this duty; and this practice has been condemned by some writers as irregular\*, upon the ground that the adjutant is to a regiment in many respects what a sheriff is to a county, and is appointed to superintend the execution of every judgment, and the inflicting of all punishments: and it is argued, that as sheriffs are expressly prohibited by *Magna Charta* from holding any pleas of the crown, or trying for any offences, so the same reason should hold against the appointment of adjutants to sit on Courts-Martial. But this reasoning has little solidity. 'The only ground on which a sheriff is disqualified from the trial of crimes, is the express prohibition of *Magna Charta*, which cannot be extended to any other officers than those specially mentioned. There is no ground in reason or in common sense for presuming that an adjutant should be a more partial or iniquitous judge, because it is his duty to see the sentence put in execution: And

the adjutant is generally not the least qualified of the officers of a regiment to decide on matters of military discipline and duty.

Regimental and garrison Courts-Martial being competent only to the trial of the lesser offences, or crimes which do not infer a capital punishment, and the cases that come before them not giving room for any intricacy of decision, or doubtful question of law, have not the aid of a Judge-Advocate to direct their proceedings. The president therefore, as well as the other members, have, on that account, much responsibility; and as the judgment of the court may come by appeal before a general Court-Martial, they ought to be particularly careful that its proceedings be strictly conformable to Military law and the practice of the army, as well as to the great principles of justice and equity.

By the former practice, and until the passing of the Mutiny-act in 1805, the members of regimental and garrison Courts-

Have n Judge-  
Advoc

Members and  
witnesses  
sworn

Courts-Martial were not sworn, as those of general Courts-Martial, nor was the evidence of the witnesses given upon oath; circumstances which gave those inferior tribunals more peculiarly the character of a court of honour, and seemed more strongly to enforce on their members the obligation of lenity and humanity in the cognizance of the smaller military offences. On the idea, however, of giving more solemnity to the procedure of such courts, the legislature has thought it advisable to put regimental and garrison Courts-Martial on the same footing with general Courts-Martial, in the above-mentioned particulars; and a clause has been added in the late Mutiny-act, 1805, ordaining the same oaths to be taken by the members of *other* Courts-Martial that are prescribed to be taken by the members of general Courts-Martial. A new Article of War has been likewise added to the former, which declares, that all persons, who give evidence in a '*general or other Court-Martial*', shall be examined upon oath,

The

The proceedings of all regimental and garrison Courts-Martial must be accurately taken down in writing, either by the president, or by a member of court appointed by him; and the sentence must be regularly signed by the president. It ought to be a further incentive to extreme caution with regard to the regularity and equity of their proceedings, that an appeal lies from all their sentences to a general Court-Martial, and that the members are liable to prosecution for an iniquitous judgment.

No judgment of a regimental or garrison Court-Martial can be put in execution until it shall have been confirmed by the commanding officer (not being a member of the Court-Martial), or the governor of the garrison where the court is held\*.

For the redressing of all wrongs or injuries which an inferior officer or soldier may sustain from his superiors, the Articles of War† declare, that “if any in-

Proceedings.

Sentence.

Every inferior officer or soldier may have the benefit of regimental Court-Martial.

\* Art. of War, § xvi. art 11.

† § xii. art 11.



“ferior officer, non-commissioned officer,  
 “or soldier, shall think himself wronged  
 “by his captain, or other officer com-  
 “manding the troop or company to which  
 “he belongs, he is to complain thereof to  
 “the commanding officer of the regiment,  
 “who is hereby required to summon a re-  
 “gimental Court-Martial, for the doing  
 “justice to the complainant; from which  
 “regimental Court-Martial, either party  
 “may, if he still thinks himself aggrieved,  
 “appeal to a general Court-Martial.” To  
 check the frequency of ill-founded com-  
 plaints, however, it is wisely enacted by  
 the same article, that “if, upon a second  
 “hearing, (of the case), the appeal shall  
 “appear to be vexatious and groundless,  
 “the person so appealing shall be punish-  
 “ed at the discretion of the said general  
 “Court-Martial.”

No commis-  
 sioned officer  
 amenable to a  
 regimental  
 Court-Martial.

It is material however to observe, that  
 as no commissioned officer is properly  
 amenable to the judgment or sentence of  
 a regimental Court-Martial, the court,

\* For the procedure in appeals from regimental to general  
 Courts-Martial, see *postea*, ch. viii.\*

on such complaint and enquiry, can only pronounce their opinion whether the complaint is well or ill founded. If they declare the latter, the complainant must either acquiesce in that opinion, or, if he thinks himself aggrieved, follow the mode of appeal to a general Court-Martial above prescribed. If the regimental court declare the complaint to be well-founded, the complainant may on that authority request a general Court-Martial to take cognizance of the injury, and bring the offender to proper punishment.

## C H A P. IV.

*Of the Preliminaries to Trial before Courts-Martial.*

## SECTION I

*Of Principals and Accessories.*

THE actual commission of military crimes, such as mutiny, desertion, &c. and the advising, aiding, and abetting others in the commission of those crimes, are both punishable by the Martial law, and therefore all offenders, either as principals or accessories in the commission of those crimes, are amenable to the jurisdiction of Courts-Martial.

Distinction between principals and accessories.

The distinction between principals in the commission of a crime, and accessories thereto, is distinctly pointed out by

Sir

Sir William Blackstone\*. “ A man may  
“ be a principal in an offence in two de-  
“ gree. A principal in the first degree is  
“ he that is the actor, or absolute perpetra-  
“ tor of the crime ; and in the second de-  
“ gree, he who is present, aiding and abet-  
“ ting the fact to be done, which presence  
“ need not be an actual immediate standing  
“ by, within sight or hearing of the fact ;  
“ but there may be also a constructive pre-  
“ sence, as when one commits a robbery  
“ or murder, and another keeps watch or  
“ guard at some convenient distance. An  
“ accessory is he who is not the chief actor  
“ in the offence, nor present at its perfor-  
“ mance, but is some way concerned  
“ therein, either before or after the fact  
“ committed. An accessory before the fact,  
“ is one, who, being absent at the time of  
“ the crime committed, doth yet procure,  
“ counsel, or command another to commit  
“ a crime. The procuring of a felony to  
“ be committed, though by the interven-

\* Black. Com, b. iv. c. 3.

“ tion of a third person, is being an acces-  
 “ sory before the fact. An accessory after  
 “ the fact may be, where a person, know-  
 “ ing a felony to have been committed, re-  
 “ ceives, relieves, comforts, or assists the  
 “ felon; and generally any assistance  
 “ whatever given to a felon to hinder his  
 “ being apprehended, tried, or suffering  
 “ punishment, makes the assister an acces-  
 “ sory. To buy or receive stolen goods did  
 “ not at Common law constitute the being  
 “ an accessory to the crime of theft, but  
 “ was held a simple misdemeanour: but  
 “ now, by statutes 5th Ann c. 31. and 4th  
 “ Geo. I. c. 11. all such receivers are made  
 “ accessories.”

Mutiny, or ri-  
 otous behaviour.

The crime of mutiny, the highest of-  
 fence of which a soldier is capable,  
 because it strikes immediately at the  
 foundation of all military subordination,  
 and by necessary consequence at the de-  
 struction of the state, is by the Martial  
 law punishable, when committed in its  
 greatest extent, with death; and in its  
 lesser modifications, with such other pe-  
 nalty

nalty as a general Court-Martial may judge adequate to the degree of the offence.

As the chief danger from this crime arises from its being shared or joined in by numbers, so it becomes a matter of high expediency, that the Military law should guard most strictly against the communication of a contagion of so dangerous a nature. It is therefore wisely held to be the bounden duty of every soldier, to check this dreadful evil in its earliest stage, and not only to resist and quell, if possible, all its active appearances, but to give immediate information of every inutinous purpose that may come to his knowledge; and the breach of this duty by inactivity or silence, being justly held to be an approbation and acquiescence in the criminal designs, is declared to be punishable in the same degree with the actual crime. Thus, by sect. 2. art. 4. of the Articles of War, it is enacted, that “any officer, non-commissioned officer, or soldier, who being present at any mutiny or sedition, shall not use his utmost endeavour to suppress

Accession  
to Mutiny

“ suppress the same, or coming to the know-  
 “ ledge of any mutiny, or intended mutiny,  
 “ shall not without delay give information  
 “ thereof to his commanding officer, shall  
 “ suffer *death*, or such other punishment as  
 “ by a general Court-Martial shall be  
 “ awarded.”

Misbehaviour,  
 abandoning  
 posts; accesso-  
 ries therein

In like manner, the high military crime  
 of misbehaviour in the face of an enemy,  
 or the yet higher, because more wilful and  
 deliberate offence, of betraying, abandon-  
 ing, or delivering up any garrison, fortress,  
 post, or guard, committed to the charge  
 of an officer or soldier, is punished ca-  
 pitally, or according to the measure of  
 the crime, not only in the person who ac-  
 tually commits it, but also in the accessory,  
 “ who shall speak words, or use any other  
 “ means to induce a governor, command-  
 “ ing officer, or others, to misbehave  
 “ before the enemy, or shamefully to  
 “ abandon any garrison, fortress, post,  
 “ or guard, committed to their respective  
 “ charge.” &c.\*

\* Article of War, § 11. art. 21. and Mutiny-act, § 1.

So likewise, the crime of desertion is <sup>Accessories to</sup> punishable, not only in the person of the <sup>Desertion.</sup> offender himself, but of the accessories. The sixth section, art. 5. of the Articles of War, declares, that “ whatsoever officer, non-commissioned officer, or soldier, shall be convicted of having advised or persuaded any other officer or soldier to desert our service, shall suffer such punishment as by the sentence of a general Court-Martial shall be awarded.” And as by article 2. of the same section, a soldier’s, or non-commissioned officer’s enlisting himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company in which he last served, is held to be desertion, and punishable as such ; so the accessories to this offence are deemed equally guilty with the principals, it being declared, that in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not,

\* Articles of War, § 14. art. 21. and Mutiny-act, § 1.



after his being discovered to be a deserter, immediately confine him, and give notice thereof to the corps in which he last served, he, the said officer so offending, shall, on being convicted thereof before a general Court-Martial, be cashiered.

Harbouring  
deserters, re-  
ceiving cloths,  
arms, &c

The harbouring or concealing of deserters, purchasing of their arms, clothes, &c. is, in the strictest sense, an aiding or abetting of the crime; but it may either be a military or a civil offence, according to the state or quality of the person who commits it. If committed by officers or soldiers, it is cognizable as a military crime by Court-Martial, and is punishable at the discretion of such tribunal. If committed by persons in a civil rank of life, it falls under a special provision of the Mutiny-act\*, which declares, “That any person  
“who shall harbour, conceal, or assist any  
“deserter from his Majesty’s service,  
“knowing him to be such; or who shall  
“knowingly detain, buy, or exchange, or

\*Mutiny-act, s 59.


“otherwise

“ otherwise receive from any soldier or de-  
 “ sserter, or any other person, upon any  
 “ account or pretence whatsoever, any  
 “ arms, clothes, caps, or other furniture  
 “ belonging to the King, or cause the  
 “ colour of any such clothes to be changed;  
 “ the person so offending, shall, on con-  
 “ viction before any justice of the peace,  
 “ by the oath of one or more credible  
 “ witnesses, forfeit for every such offence,  
 “ the sum of five pounds, to be levied by  
 “ distress, and sale of the goods and chat-  
 “ tels of such offender ; and in case there  
 “ should not be sufficient goods and chat-  
 “ tels, he is to be committed to the com-  
 “ mon gaol, there to remain without bail  
 “ for three months, or be publicly whipped,  
 “ at the discretion of the justice.”

The crime of giving or sending a chal-  
 lenge is punishable both in the principals <sup>sending chal-  
lenges.</sup>  
 and accessories ; and of the latter, the Mi-  
 litary law distinguishes various sorts. The  
 Articles of War\* ordain cashiering as the

\* Articles of War. § 7, art. 2.

punishment of a commissioned officer who shall give or send a challenge, and corporal punishment for a non-commissioned officer or soldier guilty of the same offence.

 2550165  
etc.

If any commissioned officer or non-commissioned officer, commanding a guard, shall knowingly suffer any person whatsoever to go forth to fight a duel, he shall be deemed a principal, and punished as a challenger\*.

All seconds, promoters, and carriers of challenges in order to duels, shall be deemed as principals, and punished accordingly†.

Upbraiding  
for refusing a  
challenge.

As the practice of duelling is founded on mistaken sentiments of honour, and supported by false shame, it has been laudably endeavoured, in the framing of laws and regulations for the army, to check the practice, by counteracting the principle. After announcing the punish-



Articles of War, § 7. art. 3.

† Ibid, art 3.

ments for giving or sending a challenge, it is therefore declared by the Articles of War, "That whatsoever officer, non-commissioned officer, or soldier, shall upbraid another for refusing a challenge, shall himself be punished as a challenger." And a clause is added, solemnly acquitting all officers and soldiers, of any disgrace or disadvantageous imputation, in having acted in obedience to his Majesty's orders, and done their duty, in refusing to accept of challenges.†

All

§ 2<sup>d</sup> article.

† This barbarous practice is reprobated still by the principles of religion, of good morals, of good sense, and a just sentiment of honour. The obligations from the former only apply to all mankind: they are common to all, and universally binding to all rank and condition alike. The last is more particularly applicable to the subject of discussion. The true principle of honour informs every soldier that he owes his life to his Sovereign and to his Country; that his patriotic duty binds him to that glorious service, in preference to every concern of a private or selfish nature; he cannot, without a dishonourable breach of his duty, put to hazard a life on which those claims subsist.

How just in argument, how powerfully persuasive is the following apostrophe of a most eloquent writer!

Quelling fiays

All officers, of whatever condition, have power to quell all quarels, fiays, and disorders, though even among the officers or soldiers of other regiments; and that,

“ Rentez donc en vous-même, et considérez s'il vous est permis d'attaquer de propos délibéré la vie d'un homme, et de vous poser la vôtre pour satisfaire une haine et d'ingrueuse fantaisie qui n'a nul fondement raisonnable, et si le triste souvenir du sang versé dans une pauvre occasion peut cesser de vous venir au cœur au fond du cœur de celui qui l'a fut couler ? Connoissez vous aucun crime égal à l'homicide volontaire, et si la base de toutes les vertus est l'humanité, que penseront nous de l'homme singulier et dépravé qui se livre à l'attaque dans la vie de son semblable ? Avez vous oublié que le soldat doit servir la patrie, et n'a pas le droit d'en disposer sans le conseil des lois, plus forte raison contre leur défense. Il est aux qu'il s'est tenu du duel par vertu l'on se fesse mépriser. L'homme d'honneur, dont toute la vie est sans tache et qui ne doit jamais aucun signe de lâcheté refusera de souiller sa main d'un homicide, et n'en sera que plus honoré. Toujours prêt à servir la patrie, à protéger le faible, à remplir les devoirs les plus d'ingrueux, et à défendre, en toute circonstance justice et honneur, ce qui lui est cher au prix de son sang il met dans ses démarches cette inébranlable fermeté qu'on n'a point sans le vrai courage. Dans la sécurité de sa conscience, il marche la tête levée, il ne fuit, ni ne cherche son ennemi. On voit aisément qu'il craint moins de mourir que de mal faire, et qu'il redoute le crime, et non le péril. L'honneur de couraie dédaigne le duel, et l'homme de bien l'abhorre. ” Rousseau, Julie Lettre 57

by ordering the officers into arrest, or non-commissioned officers or soldiers to prison, until their proper superior officers shall be acquainted therewith\*. A great and extraordinary measure of authority is thus committed to every person who bears his Majesty's commission as an officer, and which he ought to consider it to be his indispensable duty to exercise, whenever occasion shall require. The army is held to be one individual body, of which all the parts must co-operate together in harmony; and for the perfect attainment of this end, the authority of officers is not limited to their own regiments or corps, but is extended to every division or department of the army, wherever it is necessary to suppress disorder.

To enforce this ample authority, it is declared by the Articles of War†, that whoever shall refuse to obey such officer, (though of an inferior rank), or shall draw

\* Articles of War, § 24. art. 1.      † Ibid. ibid.

his sword upon him, shall be punished at the discretion of a general Court-Martial.

Neglect of  
this duty.

Of a duty thus specially enjoined, and powerfully enforced, the neglect or breach must be esteemed a punishable offence. All officers and soldiers witnessing quarrels, frays, and disorders, without using the authority and powers thus conferred upon them, must therefore be considered as aiding and abetting the principal offenders: and although no special penalty is prescribed for such offence by the Articles of War, they may be arraigned on that general article which ordains, that “all crimes  
“not capital, and all *disorders and neglects*  
“which officers and soldiers may be guilty  
“of to the prejudice of good order and  
“military discipline, though not specified  
“in the said rules and articles, are to be  
“taken cognizance of by a general or regimental Court-Martial, according to the  
“nature and degree of the offence, and to  
“be punished at their discretion.”

In general, therefore, it may be held as Military law, that all accessories to the commission of crimes or offences, either by the furnishing of actual aid or assistance to the principals, or by silently witnessing or concealing the crime, harbouring or assisting the escape of the criminals, or barely neglecting that essential duty of every soldier, to promote to the utmost of his power the strict observance of good order and discipline, for which the Martial law invests him with full authority, are guilty of a positive crime, and amenable for the punishment thereof to the cognizance and judgment of a Court Martial.

The accessory and the principal may both be arraigned and tried at the same time, unless they shall demand a separate trial. It seems indeed to be consonant to justice, that the accessory should be a party in the trial of the principal, in order that he may have an opportunity of controverting the guilt of his supposed principal, and by consequence, invalidating the charge against himself.



Notwithstanding it is an admitted principle in the cognizance of all crimes, that no man shall be brought twice into trial for the same offence ; (and there is an express proviso to that effect in the Mutiny-act;) yet, although a man may be acquitted on his trial as an accessory, there is nothing to prevent his being afterwards arraigned and tried as a principal ; as the offences are distinct, and the lesser cannot possibly involve the greater. But it is matter of some doubt (says Sir William Blackstone) whether, if a man be acquitted as a principal, he can be afterwards indicted as accessory *before* the fact, since those offences are often very nearly allied, and therefore an acquittal of the guilt of one, may be an acquittal of the other also. But it is clearly held, that one acquitted as principal may be indicted as an accessory *after* the fact ; since that is always an offence of a different species of guilt principally tending to evade the public justice, and is subsequent in its commencement to the other .

## SECTION II

*Of the Apprehending of Criminals in order to Trial.*

THE Articles of War direct, that whenever any officer or soldier shall commit a crime deserving of punishment, he shall, by his commanding officer, be put in arrest: if a non-commissioned officer or soldier, he shall be imprisoned, until he shall be either tried by a Court-Martial, or lawfully discharged by a proper authority.

It was formerly ordained by a clause of the Mutiny-act, that the civil power, as well as the military, should have authority to apprehend all offenders against Martial law; a clause apparently of high propriety, as military crimes are no less offences against the state, than civil delinquencies; and the most perfect co-operation should

Imprisonment  
in order to trial

Deserters may  
be apprehended  
by the civil  
magistrate.

take place between the two powers, for the enforcement of obedience to their respective laws. This clause however has been omitted in the late Mutiny-act; and the interference of the civil power for the apprehending of military offenders is limited to the case of deserters. With respect to these, the Mutiny-act ordains, that it shall be lawful for the constable, headborough, or tything-man, of the town or place where any person reasonably suspected to be a deserter, shall be found, to apprehend, or cause him to be apprehended, and to be brought before any justice of the peace living in or near such town or place, who hath power to examine him; and if it shall appear, by his own confession, or by the oath of one or more witnesses, or be consistent with the justice's own knowledge, that the suspected person is an enlisted soldier, the justice is authorised to commit him to the county gaol or the house of correction, and to give notice thereof to the secretary at war. It is likewise ordained by the same section of

the Mutiny-act, that the keeper of the gaol or house of correction shall receive the full subsistence of such deserter during the time he is in custody, but no other fee or reward. And the keepers of all gaols or houses of correction are further required to receive and confine such deserters, while on the road from the place where they were apprehended, to the place where they are to be conveyed, without any fee or reward whatever.

By a late act, 44 Geo. III. c. 140, it is declared competent to any of the Judges of the Courts of Westminster, to award a writ of *Habeas Corpus*, for bringing before a Court-Martial, for trial or examination, any prisoner who is detained at the time in any gaol or prison of the United Kingdoms of Great Britain and Ireland. As the *Habeas Corpus act* does not extend to Scotland, there is so far an inaccuracy in the terms of the said statute; but as its spirit and purport is clear, that the benefit of the enactment should extend to all parts of the United Kingdoms, so there  
can

can be no doubt, that the Court of Session in Scotland, in virtue of that *nobile officium*, which entitles it to supply the defect of positive law, would issue its warrant for the effect above-mentioned, and for the support of the just authority of Courts-Martial, over all who are guilty of military crimes.

Nature and de-  
gree of crime

Although the Martial law makes no mention of any difference in the nature of arrests in order to trial, a difference is established by the custom of the army, according to the degree or measure of the crime: an officer accused of a capital crime, or any offence of which the penalty is so severe as to afford a natural temptation to escape from justice, ought to be detained in a state of confinement as secure as the closest civil imprisonment. If the offence is of a lighter nature, the presumption is, that the officer whose character is thus impeached, must be solicitous to obtain a judicial investigation of his conduct; and he is therefore generally allowed to be in arrest at large, that is, to walk

walk about within certain limits without his sword, on his word of honour to await the issue of a trial, or his enlargement by proper authority. The degree and measure of the arrest must however be entirely at the discretion of the commanding officer, who will in all cases regulate his conduct by the particular circumstances, and by the dictates of propriety and humanity.

The Articles of War\* decree, that no officer or soldier who shall be put in arrest or imprisonment, shall continue in his confinement more than eight days, or until such time as a Court-Martial can be conveniently assembled. The latter part of this clause evidently allows a latitude which is capable of being abused: but as in a free country there is no wrong without a remedy, the military law prescribes a mode of redress for all officers or soldiers who conceive themselves injured by their commanding officer†, which must always

Time of confinement.

\* Articles of War, § 16. art 17.

† Sect. 12.

be sufficient for the restraint of every act of material injustice or oppression.

Penalty of refusing to keep prisoners, or releasing them without orders.

It is declared by the Articles of War, that no officer commanding a guard, or Provost-Marshal, shall refuse to receive or keep any prisoner committed to his charge by any officer belonging to his Majesty's forces,\* provided the latter deliver an account in writing, signed by himself, of the crime with which the prisoner is charged. Nor shall any officer commanding a guard, or Provost-Marshal, presume to release any prisoner committed to his charge, without proper authority for so doing; nor shall he suffer any prisoner to escape, on the penalty of being punished for that offence, by the sentence of a Court-Martial.

Names of prisoners to be returned.

Every officer or Provost-Marshal, to whose charge prisoners are committed, is likewise required†, within twenty-four hours after such commitment, or as soon as he shall be relieved from his guard, to

\* Sect. 16. art. 18, 19.

† Articles of War, § 16. art. 20

return in writing to the commanding officer of the prisoner's regiment, or to the Commander in chief, the names of such prisoners, their crimes, and the names of the officers who committed the prisoners to custody, on penalty of being punished for disobedience or neglect, at the discretion of a Court-Martial.

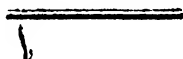
Thus, the liberty of the subject under Military law, in as far as is consistent with the ends of matériel justice, seems to be guarded with precautions little inferior in their power and efficacy, to those which secure personal liberty under the civil laws of the state.

The penalty of an officer's breaking his arrest, or leaving his confinement, before Penalty of breach of arrest. he is set at liberty by the officer who confined him, or by a superior power, is declared to be cashiering by sentence of a general Court-Martial\*.

\* Articles of War, § 16. art. 21.



## CHAP. V.

*Of the Procedure and Form of Trial before  
a General Court-Martial.*

## SECTION I.

*Of the Accusation or Charges.*

The Prosecu-  
tor.

AS the King is the prosecutor of all crimes, which are offences against the public peace, of which he is the conservator ; so is he in a more particular manner the prosecutor in military offences, which are violations of his own authority as head of the army. In all trials, therefore, before a general Court-Martial, the Judge-Advocate sustains the prosecution in the name of the King ; and that, either solely, for the cognizance of a breach of the public  
Military

Military law, as in the trial of mutiny, desertion, &c. or in concurrence with a private prosecutor, who is *generally* a party who has individually suffered an injury by the aggression and crime of the prisoner to be tried: We say *generally*, because it sometimes happens, that, for the sake of public justice, the individual who, from accidental situation, is *best* acquainted with the particular circumstances of the crime to be tried, (though it be of a public nature), and who informs as to the matter of accusation, is requested to sustain in court the character of a prosecutor jointly with the Judge-Advocate, and to conduct the examination of the evidence upon the part of the Crown: A duty this of great moment, though not without its share of painful feeling to the individual who is called upon to discharge it: But feelings of private concern must ever give way to the great ends of public justice; and the soldier or officer is unworthy of the character which he bears, and indeed materially culpable, who does not consider, that  
the

the allegiance he owes to his Sovereign, and the maintenance of Military law and discipline, are his paramount obligations, to which he is bound to sacrifice every subordinate and selfish consideration.

A prosecution may be brought in a **Court-Martial**, at the suit of a person who is himself not subject to military jurisdiction, provided the offence be of a military nature, and committed by a person under the Military law\*.

The charges or indictment.

Although the term indictment, in the limited sense in which it is understood by the writers on the Law of England, is peculiar to the courts of Civil jurisdiction, being, as Sir William Blackstone defines it, “ a written accusation of one or more persons of a crime, or misdemeanor, pre-

\* The surgeon of a regiment was lately (December 1799) prosecuted before a general Court-Martial at Norwich, at the suit of the Coroner, for neglect of duty, in not paying proper attention to a sick soldier of that regiment, who died of a dysentery in the hospital. The defendant was honourably acquitted by the Court-Martial, and the sentence was approved of by his Majesty.

“ferred to, and presented upon oath by a “grand jury;” yet in its general and proper meaning, it is, *The libel or specification of a crime, of which a person stands accused, and against which he is called to defend himself before a competent court.*— Agreeably to this definition, the charge or charges on which a prisoner is to be tried before a Court-Martial, are, properly speaking, an indictment, and must in their substance possess all its essential requisites, although in form, the military judicial procedure is less fettered by peculiar and customary solemnities of expression than the civil.

Thus, in whatever terms the accusation in the charges may be conceived, it is necessary,

1st. That the crime or offence be clearly specified and expressed; and the act or acts of guilt pointedly charged against the prisoner.

2d. That the time and place, when and where the crime was committed, be set forth with all possible certainty and precision.

Specification of  
the acts of  
crime.

As all crimes admit of certain degrees and modifications of guilt, it is essentially necessary to the ends of justice, that any prisoner who is to undergo trial for a crime, should be apprised of the extent and degree of guilt with which he stands charged, and of the particular facts of which the prosecutor means to bring evidence against him, in order that he may have a fair opportunity of invalidating the proof of those facts by contrary evidence. As, therefore, in a civil court of justice, it would not be sufficient to state in the indictment that the party is guilty of murder, without specifying the particular act of killing or slaying a certain person, and the manner in which the slaughter was committed ; so in trials by Court-Martial the charge must contain a distinct specification of the criminal act or acts. Thus, if the crime is mutiny, it is not sufficient that the charges bear that A. B. is guilty of mutiny; the particular acts of mutinous conduct in the prisoner must be clearly and distinctly enumerated ; as entering forcibly and with arms

arms into a guard-house, and releasing a prisoner; using certain specified traitorous expressions against his Majesty; or contemptuous and disrespectful language towards a superior officer: or offering such and such acts of violence against him; urging his fellow soldiers to resist military orders; persuading them to revolt, to the enemy, &c. In like manner, if the crime is abandoning or betraying a garrison, fortress, or post, not only must the particular post, fortress, or garrison be distinctly specified, but the special act of treachery described, and the manner in which it was committed\*.

There is one class of offences, in which a distinct specification of the criminal act or acts is more particularly necessary, and is indeed so essential as to be positively enjoined by the Articles of War. It is ordained by article 22 of the 16th Sect. Art. of

\* There must (says Judge Hawkins) be a *certainty* of the offence committed, and nothing material shall be taken by indictment or implication; but the *special manner of the whole fact* ought to be set forth with certainty. 2. Haw. 225, 227.

of War, that “ whatsoever commissioned  
“ officer shall be convicted before a gene-  
“ ral Court-Martial of behaving in a scan-  
“ dalous infamous manner, such as is un-  
“ becoming the character of an officer and  
“ a gentleman, shall be discharged from  
“ his Majesty’s service.” As this is a crime  
of great latitude of interpretation, and ad-  
mitting both of an indefinite variety in  
the acts from which such misbehaviour  
may be inferred, and possibly often of dis-  
crepancy of opinion with regard to the  
degree of guilt that may be attached  
to such acts; it is evident that much in-  
justice would be done to any prisoner  
who should be arraigned before a Court-  
Martial upon a general charge of “ scan-  
“ dalous or infamous behaviour, unbe-  
“ coming the character of an officer and  
“ a gentleman,” without any specification  
of the facts which were deemed to con-  
stitute such gross misbehaviour, and which  
possibly the prisoner, if apprised of them,  
might either totally disprove, or shew that  
they admitted of such extenuation from  
circumstances

circumstances as might alleviate, or altogether exculpate from the charge. To this Article of War the following wise and equitable clause is therefore subjoined.

“ Provided, however, that in every charge  
 “ preferred against an officer for such scan-  
 “ dalous or unbecoming behaviour, the  
 “ fact or facts on which the same is  
 “ grounded shall be clearly specified.”

As this is the only instance of a military crime in which the Articles of War particularly enjoin that the charge shall contain a clear or distinct specification of the facts, it might perhaps be argued, that in other crimes such specification is not essentially necessary : and it must be owned that in practice it has too frequently been dispensed with, and a general charge allowed, as of mutiny, disobedience of orders, disrespectful conduct to superior officers, &c. But the generality of such charge, although it may not be absolutely reprobated by the Military law, or amount to a voidance or annulling of the indictment, affords in every case a competent and



weighty objection upon the part of the prisoner, which he may urge to the effect of having the charge rendered special by a pointed detail from the prosecutor of the particular facts on which it is founded: and this requisition by the prisoner, which is founded in material justice, no Court-Martial can legally refuse. In every case, therefore, it is most advisable to prevent all objection by a clear specification of the facts in the charges furnished to the prisoner on which he is to be arraigned.

The charges must clearly design and mark out the person of the prisoner, by his name, surname, rank, or station, and regiment to which he belongs, &c. as A. B. captain, lieutenant, ensign, serjeant, private soldier, &c. in the —— regiment, &c.

Specification  
of time and  
place.

The same minuteness and precision ought to be observed in specifying the *time* and *place* when and where the facts charged were committed, whenever it is possible to be thus particular; for such specification may in most cases be essentially necessary towards the prisoner's defence.

fence. One of the most complete and conclusive proofs of exculpation is an *alibi*, ~~that~~ is, when convincing evidence is produced to the court that the prisoner was in a different place at the time when the crime is charged to have been committed. As to the circumstance of *place*, it is in all cases possible for the prosecutor to be most pointed and specific; and therefore such specification can never be dispensed with in the framing of the charge. But with regard to *time*, there cannot always be the same certainty and precision. Witnesses, with no intention to falsify, may, from the lubricity of memory, vary in their testimony as to hours, days, time of the day, name of the month, &c. and yet be most pointed and accurate as to the acts committed. The prosecutor therefore wanting the same absolute certainty for his information, is allowed some latitude with respect to time; and provided the charge is in other respects sufficiently precise, he may charge the fact or facts to have been committed on such a day of such a month,

or on one or other of the days of that month, or of the month immediately preceding, or that immediately following. But as this is an indulgence granted only from necessity, so in no case where it is possible for the prosecutor to mark the time with certainty and precision, ought he to be allowed such latitude as that above mentioned, as it deprives the prisoner of all opportunity of proving an *alibi*.

It is not necessary to refer specially to the Articles of War, &c

Although no crimes or offences are cognizable by a Court-Martial, unless those which are either specially declared to be such by the Articles of War and Mutiny-act, or fall under the general description of disorders or neglects to the prejudice of military discipline; it is not customary, nor is it necessary, in drawing up the charges against an offender, to refer to any particular Article of War, or clause of the Mutiny-act, of which he has been guilty of a breach. Such reference can answer no good purpose, but might often lead to cavilling and captious objection.

The

The specification of the criminal act is sufficient intimation to the prisoner that his offence is considered by the prosecutor to be a breach of the Military law, and it is always competent for him to dispute its relevancy, and to call upon the prosecutor to shew in what respect it falls under the prohibitions of that law.

A true copy of the charges on which the prisoner is to be tried, must be furnished to him by the Judge-Advocate, in such time before the meeting of the court, as that he may have full opportunity for preparing himself for his defence, that is, for collecting such evidence, either oral or written, as may be necessary for his exculpation, or for redarguing the proofs of the charges; for the advising with his counsel on all points touching the conduct of the trial, objections to the members of the court, competency of the witnesses, &c.

Copy of the charges must be furnished to the prisoner.

After the charges have been thus furnished to the prisoner, it is not competent for the Judge-Advocate or the prosecutor to make any alteration on them, either in substance

substance or in form, when they come before the court. If a material alteration occurs to be made before trial, the consent of the commander in chief, or of the person on whose warrant the trial is to proceed, must be obtained for that alteration, of which likewise the prisoner is entitled to have the most timely notice that can be given to him. ▶

## SECTION II.

### *Form of Constituting the Court.*

Authority under which the court is constituted

**G**ENERAL Courts-Martial being assembled either by the direct authority of the Sovereign, under the royal sign-manual, or by warrant of a general officer to whom that special power has been delegated by the Sovereign ; such authority or warrant is directed to the person appointed to officiate as president of the court, and the day, hour, and place of meeting are therein specified. In warrants under his

his Majesty's sign-manual, the whole members of the court are frequently, though not always named, and the warrant is intimated to them by the Judge-Advocate or his deputy. In those issued by commanders in chief, the intimation to the members is commonly given by the adjutant-general to the commanding officers of those regiments from which they are to be chosen.

All trials before Courts-Martial, like those in the civil courts of judicature, are conducted publicly, and with open doors; and in order that this publicity of trial may in no case be attended with tumult, or indecorum of any kind, the court are authorised by the Articles of War, to punish, at their discretion, all riotous or disorderly proceedings, or menacing words, signs, or gestures, used in their presence.

The president and the whole members of the court being assembled on the day appointed for its meeting, and intimation having been previously given for all the necessary witnesses to attend, the prisoner is

Prisoner brought into court.

is brought into court, and called to the bar by his name; and although till that period he may have been in close imprisonment, and even in irons, he must appear there unfettered, and without bonds of any kind; unless (as the ancient law and custom authorise) when there is danger of escape or rescue\*. The president now delivers the warrant for holding the court into the hands of the Judge-Advocate, who reads it aloud, as also his own warrant for attending as prosecutor and recorder of the court. He then calls over the names of the whole members, who are desired to take their places according to their rank in the army, and the dates of their commissions, arranging themselves in that order, alternately on the right and left hand of the president.

Privilege of  
challenging the  
members.  
Grounds of  
challenge.

The Judge-Advocate then demands of the prisoner, whether he has any objection against, or challenge to make of any of the members present; and if he has, he is required to state his cause of challenge, on

which the president and members must order the court to be cleared, and deliberate on the import and validity of the same. In the trial of crimes before the Civil courts, the Law of England allows to the prisoner a right of *peremptory* challenge, that is, of positively disclaiming such and such persons (to a certain number) to be of the special jury, without any cause or objection shewn. In Courts-Martial, however, there is no such liberty allowed: The prisoner must assign his cause of challenge, of the relevancy or validity of which, the members are themselves the judges.\* The most valid causes of challenge,

Writers on Martial law have differed on this point. Mr Adye, in his treatise on Courts-Martial, holds, that the prisoner before a Court-Martial is entitled to the same privilege of peremptory challenge; that is, without shewing cause, as the prisoner before a civil tribunal. But this opinion seems to rest on no foundation of reason, or authority from practice. The privilege in Civil courts is limited to the members of the jury, but does not extend to the judges, who are sworn to administer impartial justice. The members of a Court-Martial are not only jurymen, but judges; and they take a similar oath. The peremptory challenge of a number of jurymen can be attended with no inconvenience, because they may be instantly replaced by an equal number of others; but this, with regard



lenge, are, *suspicion of prejudice or malice, and infamous character*. The suspicion of prejudice may be reasonably inferred against a juror, from the circumstance of near relation to any person or party injured by the crime of the prisoner, or having an interest in the cause, whereby he may be led to wish the condemnation of the prisoner. As such causes of prejudice are various in their degree, it is in the breast of the members, as judges of their validity, to give them what weight they may conceive they are entitled to; nor can any general rule of decision be prescribed.

As previously to the assembling of a general Court-Martial, it sometimes happens, that a court of enquiry is appointed, for the purpose of determining whether there appear sufficient grounds for bringing the person accused to trial; and it is allowed

regard to the members of a Court-Martial, would frequently be impossible; and thus the ends of justice would be entirely defeated. Immemorial usage has given the one practice a solid foundation in the common law of the country; but there is no usage or practice in favour of the other.

to

to such court of enquiry, to call before them, and examine, all witnesses, both in support of, and defence against the accusation, and report their opinion of the grounds of charge; it has been questioned, whether the members of such court of enquiry are thereby incapacitated from being afterwards appointed to sit on a Court-Martial for the trial of a prisoner on whose cause they have already reported their opinion. A court of enquiry bearing a near affinity to a grand jury, and the law being precise on that point, that no grand juror who has found a bill of indictment against a prisoner, can be a member of the petty jury on the trial of that prisoner, or even on the trial of another, wherein the same matter is in question: \* it seems to be thence, with much reason concluded, that it is sufficient ground for challenging the member of a

\* 25th Edw. III. c. 3. 8th Hen. IV. 2. Pl. 4. Coke upon Littleton, 157. 6. It is even held to be law, that if a grand jurymen, who was one of the indictors in the same cause, be returned upon the petty jury, and do not challenge himself, he shall be fined Hale's Hist. Com. I. 2. 309.

general Court-Martial, that he had given his opinion of the cause in a previous court of enquiry: for although the members of a court of enquiry do not actually pronounce a sentence upon the cause, having no powers to compel the attendance of witnesses, nor to examine them upon oath; and, in fact, only report their opinion, whether there appears sufficient ground for bringing the accused person to trial: yet even that opinion is derogatory from absolute impartiality, a natural bias thence arising to support and justify it on the final trial.

So jealous is the law of the perfect impartiality of jurors, that it is allowed to be a good cause of challenge, that the juror has been heard to give his opinion beforehand, that the party is guilty, 2. Haw. 418; and a similar ground of challenge against the member of a Court-Martial would, without doubt, be sustained.

Much more would it be a sufficient ground of challenge against the member of a general Court-Martial, in an appeal  
from

from the sentence of a regimental court, that the same person had been one of the judges in the latter.

Two causes of challenge impossible to be over-ruled, are, the charge of corruption or bribery, verified by competent proof; and malice or hostile enmity, expressed by word or deed, against the prisoner. Infamous character is likewise a most relevant ground of challenge; but as this objection admits of no precise definition or description, it would be necessary, wherever it is moved, that the facts or reasons on which it is founded, should not only be specified, but instantly verified or proved. Thus, a juror may be reasonably challenged, on the head of infamous character, who has been tried and convicted of a crime; but the proof of that fact must be produced in court, that is, the record of his conviction.

The privilege of challenging is mutual to the prisoner, and to the prosecutor; for there may be sources of prejudice in favour of the prisoner as well as against him,

and urgent motives that may sway to acquit, as well as to condemn.

Members  
sworn.

Where the prisoner and prosecutor decline to challenge any of the members, or where the causes of challenge have been disallowed, the Judge-Advocate proceeds to administer, first to the president alone, and afterwards to the members of the court, the oath prescribed by the Mutiny-act and Articles of War.' The oath is taken by each person holding his right hand upon the Evangelists, repeating the words after the Judge-Advocate, and, finally, kissing the book. After the oath has been administered to the whole members, the president administers to the Judge-Advocate the particular oath of secrecy required to be taken by him.

Observations  
on the nature  
of the oaths.

The oath to be taken by the president, and members, contains a two-fold obligation of secrecy. 1st, 'That the juror shall not divulge the sentence of the court for a limited time, "until it shall be approved of by his Majesty, or 'by some person "duly authorised by him;" and 2dly, that  
he

he shall not, “ upon any account, at any  
“ time whatsoever, disclose or discover  
“ the vote or opinion of any particular  
“ member of the Court-Martial, unless  
“ required to give evidence thereof as a  
“ witness, by a court of justice, in a due  
“ course of law.” Both these obligations  
have their foundation in reason and good  
policy. No sentence of a Court-Martial  
is complete or final, until it has received  
his Majesty’s approbation, or that of the  
commander, by whose warrant the court  
is assembled. Until that period, it is,  
strictly speaking, no more than an opinion,  
which is subject to alteration and reversal.  
In this interval, the communication of that  
opinion could answer no ends of justice,  
but might in many cases tend to frustrate  
and defeat them. The obligation to per-  
petual secrecy with respect to the votes or  
opinions of the particular members of the  
court is likewise founded on the wisest po-  
licy. The members of a Court-Martial  
cannot boast the same independence on  
the Crown, and consequent immunity  
q 2 from

from influence, as the judges in the ordinary courts of law. The officers who compose a military tribunal, are all necessarily dependent for their preferment on the Crown, and its ministers. They are even, in some degree, under the influence of their General in chief: powerful motives of opinion, and which might sometimes lead astray a weaker mind from the direct path of justice. This danger, therefore, is best obviated by the confidence and security which every man possesses, that his particular opinion is never to be divulged. Another reason, of yet a stronger nature, is, that the individual members of the court may not be exposed to the resentment of parties, and their connections, which can hardly fail to be excited by those sentences which it is often necessary for Courts-Martial to pronounce. It may be necessary for officers, in the course of their duty, daily to associate, and frequently to be sent on the same command or service, with a person against whom they have given an unfavourable vote or opinion

opinion in a Court-Martial. The publicity of these votes or opinions would create the most dangerous animosities, equally fatal to the peace and security of individuals, and prejudicial to the public service.

The oath which is taken by the Judge-Oath of Judge-Advocate Advocate contains no obligation to secrecy, until the sentence shall have received the approbation of his Majesty, or that of the Commander in Chief; because it may be of material importance, that previously to that approbation, the opinion, of the Judge-Advocate, with regard to the propriety, justice, and legality of the sentence of the court, should be known to that power to which belongs the privilege of ratifying, or of suspending, and ordering a revísal of that judgment. But as the law dispenses with this positive obligation on the Judge-Advocate only for a particular and necessary purpose, so, in all other respects, he will certainly consider himself, though not bound by an oath, yet restrained by the equally powerful tie of honour, from an unnecessary and impro-



per disclosure of the opinion or sentence of the court; which, if allowed, would, in fact, render useless the positive obligation of the members to secrecy. The Judge-Advocate, is bound by oath, however, as well as the members of the court, to maintain the strictest secrecy with regard to the votes, or opinions of individuals, for the same reasons of expediency and good policy.

The oaths are  
to be adminis-  
tered once  
only

These oaths, which are taken previously to the Court-Martial's proceeding to any trial, form in, fact, the essentials by which the court is constituted; they therefore create an obligation, which is binding on all the members, until it is finally dissolved. It is, on that account, unnecessary and improper (for all unnecessary oaths are improper), for the same Court-Martial to repeat the ceremony of taking these oaths for every new trial. The writers who have maintained this opinion, have grounded it on the words of the given by the Judge-Advocate, previous to the oath of the members; "you  
" shall

“ shall well and truly try, and determine.  
“ according to your evidence, in the *matter*  
“ now before you.” But, in the first place,  
the term *matter* being generic, will apply  
to every subject of criminal prosecution  
which is to be tried by the court: and, se-  
condly, in the particular oath which fol-  
lows, and which is taken by each of the  
members, the words are entirely general,  
applying to their duty as judges; with  
which character they continue invested,  
till the whole trials are finished, and the  
court is dissolved. It has been urged, in  
opposition to this doctrine, that the privi-  
lege of challenging the members of the  
court being competent to every prisoner,  
and custom requiring that such challenge  
should be made before the members are  
sworn: if that form were not to be re-  
peated in the commencement of every new  
trial, none could avail themselves of the  
right of challenge, but the first who was  
arraigned. But there is no reason of jus-  
tice, or of common sense, that should pre-  
clude a prisoner from challenging, on suf-  
ficient

ficient cause, any of the members *after* the court is sworn; provided he had no opportunity of moving his objection *before* that form was gone through. An objection cannot be said to be waved, which the objector had no power of urging.--- Nay, let the case be figured, that a prisoner had positively declined to challenge any of the members of the court, as being ignorant at the time of any competent or just objection; in consequence of which, the whole members are solemnly sworn, and the trial is entered upon; and afterwards a most just cause of challenge comes to the prisoner's knowledge, emerging perhaps from the evidence itself; can any doubt be entertained that such challenge would be good to the prisoner? It may, in practice, be held incompetent to challenge a juryman after he is sworn; but admitting this to be the practice with respect to juries (for which, however, there appears to be no sufficient reason), the analogy does not hold good between a jury which is chosen anew for every particular trial, and

and whose functions begin and end with that trial, and a Court-Martial, which, where many offences are to be tried, is, by the terms of the warrant for its constitution, authorised “to hear, examine, and “give judgment in all such matters as “shall be brought before them.”

### SECTION III.

#### *Arraignment and Trial of the Prisoner.*

THE Court being now regularly consti- Incidents to arraignment.  
tuted, and every preliminary form gone through, the Judge-Advocate, as prosecutor for the Crown, desires the prisoner to listen to the charge or charges exhibited against him, which he reads with an audible voice; and then the court asks the prisoner, “Whether he is guilty or not guilty “of the matter of accusation?”

Thus arraigned, the prisoner may either,  
1mo. *stand mute*, that is, refuse to answer,  
or

or answer foreign to the purpose ; or, *2do*, *confess* the fact of which he is accused ; or, *3tio*, plead *not guilty* to the charge.

Standing mute.

*1mo*, If the prisoner stands mute from obstinacy and deliberate design, or answers impertinently and foreign to the purpose ; the court will, in the first place, endeavour with wisdom and temperance to overcome his obstinacy, by setting before him the dreadful consequence which awaits him, and which is nothing less than immediate conviction and sentence\*. If all endea-

\* By the ancient law of England, in cases of high treason, and in petty felonies and misdemeanors, the prisoner's standing mute was equivalent to a conviction ; but in other felonies the punishment of pressing the prisoner to death under an immense weight of iron, (termed *paine forte et dure*), was authorised in the case of standing mute from obstinacy, 3d Edw. I. c. 82. And this barbarous punishment, though rarely put in execution in these latter ages, continued to be authorised by law, till it was solemnly abolished by statute 12th George III. c. 20. which enacted, that every person who being arraigned for felony or piracy, shall stand mute, or not directly answer to the offence, shall be convicted of the same ; and the same judgment and execution (with all their consequences in every respect) shall be thereupon awarded, as if the person had been convicted by verdict, or confession of the crime. *Blackstone*, b. 4. c. 25.

your to this purpose is unavailing, the court must proceed to give judgment, as if the prisoner had been regularly convicted on the completest evidence.

But a prisoner may stand mute from natural impediment, as the want of the faculty of speech. It very rarely happens, however, that persons labouring under that misfortune, have not the power of expressing their meaning by intelligible signs, unless they want the use of reason. Where therefore a prisoner is arraigned, who, by some supervening disease, has lost the faculty of speech; (for we can hardly suppose a person dumb from his birth to be in a situation that subjects him to Military Law), it would be necessary, in the first place, to make him clearly understand the full import of the charges on which he is to be tried; and afterwards to obtain from him, by the most intelligible signs, a clear and unequivocal assent to, or denial of the matter of accusation. If this should be found impracticable, and there should be the smallest doubt with regard to his mean-  
ing

ing and intention, he must be presumed to have pleaded *Not guilty*; and the trial must proceed in every respect as if he had explicitly done so. Indeed, in every case where the prisoner cannot express his meaning by words, it is the safest course, and surely the most humane, to presume a denial of the charge, and to proceed to trial accordingly. Sir William Blackstone, however, observes\*, that it is a point yet undetermined, whether judgment of death can be given against such a prisoner who hath never pleaded, and can say nothing in arrest of judgment.

When an in-  
terpreter is

A prisoner's ignorance of the language in which he is arraigned, and in which the trial is to be conducted, may bring him into a predicament somewhat similar to that of standing mute to the charge. In such case, it is necessary that a neutral person of ability and discretion, who is equally skilled in both languages, should be sworn, to interpret between the prisoner

\* Blackstone, b. 4. c. 25.

and

and the prosecutor and court. This interpreter must, in the first place, explain to him distinctly the import and substance of the charge, and deliver to the court his answer to the accusation; and during the whole course of the trial, he must translate, for the benefit of the prisoner, the import of the evidence of each of the witnesses, and put such questions as the prisoner shall suggest, either in the way of cross examination of the evidence for the prosecution, or directly as exculpatory proof.

2do. If the prisoner plainly and explicitly confesses the crime with which he is charged, nothing remains for the court but to pronounce judgment; but as, in such circumstances, the awarding of a capital or most rigorous sentence is peculiarly painful, the court, not only for the ease of their own minds, but in humanity to the prisoner, who may perhaps be influenced by an illusive hope of mercy, will not willingly record such confession, or preclude the unhappy criminal from ample time and opportunity of retracting it. If, indeed

Confessing the crime.



deed, the special facts and circumstances of criminality be set forth in the charge or indictment, and the prisoner shall voluntarily and freely make a confession of his guilt of the whole of those circumstances, though fully certified by the court of the consequence of such confession, it would seem that all further investigation is of course superseded: But if the charge contains only a general description of the crime, (as, for example, that the prisoner is guilty of mutiny, without specifying any particular acts) it would then be competent to the court, and indispensably their duty, notwithstanding the prisoner's confession of guilt, to inform themselves, by the examination of witnesses, of the particular act or acts, with all their attendant circumstances, which might either extenuate or aggravate the crime; and of which, therefore, a full knowledge is necessary to direct to the measure of punishment. In all such cases, indeed, if a criminal court is influenced, as it ever ought to be, by the equitable

table consideration of duly proportioning punishment to the degrees of offence; reason and humanity will plead with equal force in their breasts for a mitigation of the doom of a penitent and confessing offender. The essence of a crime is the *animus* or intention with which it is committed, and the malignancy of that *animus* is the measure of its atrocity. But most assuredly the mind of that offender is less obstinately and inveterately malignant, who, under the strong impression and consciousness of his guilt, explicitly avows it, and throws himself upon the mercy of his judges, than of him, who, guilty of the same crime, has the hardihood to persist in a denial of his guilt, and boldly to abide the issue of a trial.

*3tio.* But the most customary plea of a prisoner, and always the most desirable, is the general issue, or that of *not guilty* of the charge: And this plea must be simple, and without qualification or justification; that is, an absolute denial on the part of the prisoner of the crime which is laid to his

General issue,  
not guilty.

his charge. This cannot be better explained than in the words of Sir William Blackstone, which, though relating, strictly speaking, to trial before the civil courts of justice, are equally applicable to Courts-Martial. "In case of an indictment for felony or treason, there can be no special justification put in by way of plea. As on an indictment for murder, a man cannot plead that it was in his own defence against a robber on the highway, or a burgler; but he must plead the general issue, not guilty, and give this special matter in evidence. For, (besides that these pleas do in effect amount to the general issue, since, if true, the prisoner is most clearly not guilty), as the facts in treason are said to be done *proditorie, et contra ligeantiae sue debitum*; and in felony, that the killing was done *felonice*; these charges, of a traitorous or felonious intent, are the points and the very *gist* of the indictment, and must be answered directly by the general negative, not guilty; and

“ and the jury upon the evidence will take  
 “ notice of any defensive matter, and give  
 “ their verdict accordingly, as effectually  
 “ as if it were or could be specially pleaded.  
 “ So that this is, upon all accounts, the  
 “ most advantageous plea for the priso-  
 “ ner \*.”

But a prisoner who neither stands mute, <sup>Pleas in bar of trial.</sup> confesses the crime, nor pleads not guilty to the charge, may, immediately upon his arraignment, offer certain pleas in bar of the trial; as that he has been formerly tried for the same individual act or acts of crime; which, if verified by production of the record of his acquittal or conviction, or even by other sufficient evidence, must be effectual to quash the trial. It may be easily understood, however, that the plea of a former acquittal can be of no avail, if the new trial is brought in appeal of the judgment of the court which had pronounced the sentence of acquittal. A pardon of the crime, for which the prisoner is

\* Blackstone, b. 4. c. 26.

arraigned, is likewise a valid plea in bar of the trial. Nor is it to be doubted, that a promise or assurance of mercy given on the condition of becoming evidence against an accomplice, or a criminal, who is tried for the same offence, would be admitted by the court as an effectual bar of the trial of the person who pleads it, and verifies his plea.

But with respect to these pleas in bar of trial, it is proper to remark, that although, if admitted, they are conclusive in favour of the prisoner, they are not, if repelled, conclusive against the person who urges them; that is to say, if the court shall determine against him upon the plea in bar, he shall not be thereupon immediately convicted, but shall still be at liberty to resort to the general issue, or the plea of not guilty of the charge: "For the law," says Blackstone, "allows many pleas by which a prisoner may escape death, but only one plea in consequence of which it can be inflicted, viz. on the general issue, after

“ after an impartial examination and discussion of the facts\*.”

A prisoner, moreover, may validly object to the jurisdiction of the court, if it appear that they have no proper authority for taking cognizance of the crime ; as if a soldier were arraigned before a Court-Martial for a crime cognizable only by the civil courts, or arraigned before a regimental Court-Martial upon a capital charge. It would likewise be a valid exception to the jurisdiction, that the court did not consist of the requisite number of members, or that these were not of the requisite rank to sit upon the trial of the prisoner : as, if a lieutenant or ensign were appointed to sit on the trial of a field officer, contrary to the regulation of the Mutiny act.

Objections to the jurisdiction.

The prisoner, having pleaded the general issue of not guilty, the prosecutor proceeds to adduce his evidence in support of the charge, by the examination of wit-

Trial.

\* Book 4, c. 26.

nesses, and the production of such written documents as tend to substantiate and prove the matters of accusation; a list of the witnesses having been furnished to the prisoner previously to the trial, that he may be aware, and have full time to deliberate on any objection that may lie against their admissibility, or prepare himself to encounter their testimony by contrary evidence.

If the accusation resolves itself into a variety of distinct articles or charges, the court will allow the prisoner his option whether to urge his defence and examine evidence separately to each article, or to enter upon the general proof of exculpation after the prosecutor has gone through the whole of his evidence in support of the charges. The former mode of procedure seems the more eligible where the prisoner is charged with several distinct and separate crimes; as if, for example, the same person were charged in the same accusation with disobedience of orders, embezzling of stores, and encouraging mutiny:

mutiny : the latter mode seems preferable where the charges, though consisting of separate acts, either amount to the same crime, or are intimately connected together, as false musters or false returns, made at different times ; various acts of embezzling of pay, of clothing, and of forage, &c.

In order to maintain regularity in the proceedings of the court, the witnesses in support of the charges are first examined by the Judge advocate or prosecutor, and when he has finished his interrogatories, the prisoner is allowed to cross-question, that is, to put any relevant questions that may occur to him, arising from and relative to the evidence already given. When the prisoner has finished his cross-questioning, the court put any questions that they may think proper, in explanation of what has been already sworn, or in farther proof of the articles of charge.

Examination  
of the witness-  
es.

Each

\* It is of importance that this rule, which is common to all criminal courts, should be strictly observed. A deviation from it deranges the chain of evidence, and introduces perplexity



Each witness, previously to his examination, is sworn by the Judge-Advocate upon the holy Evangelists, to declare the truth, the whole truth, and nothing but the truth, in so far as shall be asked of him upon the trial.

ence must  
be taken down  
in writing.

The Judge-Advocate, who is the recorder of the court, takes down the whole evidence in writing from the mouth of the witnesses; beginning each testimony with the name and designation of the witness, and noting whether he is an evidence for the prosecutor or the prisoner; as, "A. B. Lieutenant in the                      regiment of infantry, a witness for the prosecutor, solemnly sworn and examined, deposeth as follows." The evidence is most usually taken down in the way of question and answer, each interrogatory denoting the party who puts it; as, Q. by the prosecutor: Q. by the court; Q. by the prisoner.

and confusion into the record of the proceedings. See Lord Mansfield's just observation to that purpose, on the trial of Lord Byron before the House of Peers, *State Trials*, vol. x. p. 524.

Some-

Sometimes, however, a witness gives his testimony in the way of narrative; in which manner it must likewise be taken down in writing, the recorder adhering as nearly as possible to the very words of the witness.

After a witness has delivered his evidence, and it is taken down in writing by the clerk or recorder of the court, the witness may with propriety demand that it shall be read over to him, and he will be allowed either to explain his meaning, if he conceives it to be imperfectly or ambiguously expressed, to supply any omissions which he has made, or to rectify any errors into which he may have fallen through haste or inadvertence. So likewise, if such inaccuracy, omission, or error, should be remarked by the court, they will order the deposition of the witness to be read over, and will put such additional questions as they judge requisite for its correction or explanation.

No witness is permitted to read his evidence in delivering it to the court; for this

might give room for subornation of evidence, against which every court is most anxious to guard, by the preliminary questions, whether the witness has been instructed what to say, or received any reward, or promise of reward, for giving his testimony. Although, however, the witness is not allowed to read his evidence, it is not illegal or improper, in circumstantial cases, or in cases where dates are to be detailed, or matters of account, for the witness to make use of written notes, for the aid of his memory, and for the greater precision of his testimony.

Witnesses  
must be exa-  
mined apart.

The more effectually to guard the purity of the evidence, those who are cited to appear as witnesses are not allowed to be present in court during the examination of any of the previous witnesses, as this circumstance would of itself afford a valid objection to their testimony, being a species of subornation\*. It is proper, therefore, that

I am well aware, that this rule, which appears to be essential to the fair investigation of truth, is so little attended to in

that in the commencement of the trial, and indeed in the outset of every day's proceedings, the Judge-Advocate should give warning to all who are cited as evidences, and who may chance to be present, to retire, and not to enter the court till they are officially called upon to be sworn and give testimony.

in the practice of the civil courts in England, that, unless when the request for a separate examination is made by a party in the cause, the whole witnesses, in criminal trials, are allowed to be present in court, and to listen to each other's evidence. If a party demands that the witnesses be examined apart, it is granted him, as an *indulgence* from the court (See State Trials IV. 754, and V. 20.) But this, so far from being of the nature of an indulgence, is a claim of right; and if not urged by the party, the court, for its own sake, and for the great ends of truth and justice, ought carefully to attend to it. It is astonishing that the impropriety of the contrary practice should not be universally acknowledged. If a witness is not allowed to read his evidence, from a just suspicion, that what he deposes in that manner may have been suggested to him or dictated by others, is there not a similar ground of suspicion, that the depositions of the preceding witnesses, and the detail of facts delivered by them, may have their influence on his mind, and aid him in the framing of his own testimony? I have stated in the text that doctrine which is agreeable to the law and practice of Scotland, which is founded on the maxim of the Roman law, *Testes in secreto audiendi*. Heinccc. El. Jur. Civ. L. 14. *Cod. de Testibus*; and which ought to be universal, as it is founded in wisdom, good sense, and material justice.

Courts-

Counsel, if allowed in a Court Martial.

Courts-Martial being in general composed of men of ability and discretion, but who, from the nature of their profession and general mode of life, are not to be supposed versant in legal subtilties, or abstract and sophistical distinctions ; and the cases that come before them giving rise to few questions of law ; it has hence been considered as founded in established usage, that counsel or professional lawyers, are not allowed to interfere in their proceedings, or, by argument or pleading of any kind, to endeavour to influence either their interlocutory opinions or final judgment. This is a most wise and important regulation, nor can any thing tend more to secure the equity and wisdom of their decisions : For lawyers being in general as utterly ignorant of Military law and practice, as the members of Courts-Martial are of civil jurisprudence and the forms of the ordinary courts ; so nothing could result from the collision of such warring and contradictory judgments, but inextricable embarrassment, or rash, ill-founded, and illegal decisions.

But

But although it is thus wisely provided, that professional lawyers shall not interfere in the proceedings of Courts-Martial, by pleading or argument of any kind, it is at the same time not unusual for a prisoner to request the court to allow him the aid of counsel to assist him in his defence, either in the proper conduct of his exculpatory proof, by suggesting fit questions to the witnesses, or in drawing up, in writing, a connected statement of his defence, and observations on the general import of the evidence. This benefit the court will never refuse to a prisoner ; because, in those unhappy circumstances, the party may either want ability to do justice to his own cause, or may be deserted by that presence of mind which is necessary to command and bring into use such abilities as he may actually possess. In this situation, however, the prisoner's counsel who properly understands his duty, will see that it is his part not to embarrass, to tease, or to perplex the court, but rather to conciliate their favour, by wisely regulating the conduct

duct of his client; not to force the discordant and unsuitable axioms and rules of the civil courts upon a military tribunal, but candidly to instruct himself in that law which regulates their procedure, and accommodate himself to their forms and practice.

When the evidence, in support of the charges, is closed; the prisoner sometimes judges it proper to submit to the court, either verbally, or in writing, a general statement of those defences which he means to support by evidence. He then enters upon his exculpatory proof, by examining such witnesses as he thinks material to redargue the preceding evidence, or to establish his general character and good behaviour; or by producing written documents to these effects. The examination of the exculpatory witnesses is conducted in a similar manner to that of the evidence for the prosecution. The prisoner first interrogates his own witnesses, putting his questions either himself, or by the mouth of the Judge-Advocate. When his interrogatories

gatories are ended, the prosecutor is entitled to cross-question the evidence; and finally, the court put all questions to the witnesses that appear to them proper for bringing out the truth.

When the whole evidence on both sides is closed, the prisoner may, if he thinks proper, demand leave of the court, to sum up, either verbally, or in a written statement, the general matter of his defence, and to bring into one view the import of the proof of the charges, with such observations as he conceives are fitted to weaken its force; and the result of the evidence in defence, aided by every argument that is capable of giving it weight.

To this statement, on the part of the prisoner, the prosecutor has a right to make a reply; and under this privilege he may either recapitulate, methodise the import of his evidence, and strengthen it by pertinent argument, or shew the weakness and insufficiency of the proof in exculpation: and here, in strict regularity, the trial ends. But if the prisoner shall, in his defence,



fence, have impeached the credibility of any of the witnesses for the prosecution, it is competent for the prosecutor to re-establish their character by new evidence;\*

or,

\* As this is a point attended with considerable difficulty, it may be proper to illustrate what is here said, by a remarkable example. On the trial of Lord George Sackville, after the conclusion of the evidence, both for the prosecution and defence, "the Judge-Advocate, as prosecuting in his Majesty's name, stated to the Court, that Lord George Sackville had, in his defence, impeached the credibility of Lieutenant-Colonel Sloper, in many respects; and especially by examining several witnesses to prove that his Lordship did not appear to them to be at all alarmed or confused; during the course of the day; and proposed, by way of reply, to support the credibility of this witness, 1st, by producing other officers of the cavalry, then under his Lordship's command, to speak as to their judgment, of Lord George Sackville's appearance at different times on that day: and 2dly, By examining other persons to corroborate the testimony of this witness, by shewing that he gave the same account, in general, at the time, and within a short time after, as he had given upon the trial: And, in regard Lord George Sackville had endeavoured to prove; that he was not where Lieutenant-Colonel Sloper, and other witnesses for the Crown, had supposed him to be; and that it was therefore impossible for the said Lieutenant Colonel Sloper to have heard what he has asserted concerning him: the Judge-Advocate proposed, 3dly, To examine other witnesses to establish the testimony of the former, by shewing that his Lordship was, in fact, where their evidence

" had

or, if the prisoner in his defence shall have introduced any new matter, encountering the

“ had supposed him be. Lord George Sackville thereupon  
 “ *objected* to the two first of the said proposals, urging, amongst  
 “ other reasons by him offered, that the *veracity* only, and not  
 “ the *credibility* of the witness had been impeached; and  
 “ therefore, that there was no pretence, in reply, to examine  
 “ any persons to establish what had not been attacked;  
 “ and that examining other persons as to their opinion of  
 “ his appearance, was going into new proof to enforce the  
 “ charge, which ought not to be admitted in reply. But the  
 “ prosecutor still contending for the examination of these wit-  
 “ nesses, and alledging, that the circumstance of his Lord-  
 “ ship's appearance was not relied upon as a point essential to  
 “ the charge, (which was disobedience of orders only), but an  
 “ incidental matter mentioned by a witness, of which advan-  
 “ tage had been taken to invalidate his credit; and that the  
 “ other matter proposed, was to answer the general impeach-  
 “ ment of the witness's credibility, and especially to shew that  
 “ his testimony was not influenced by the implied censure of  
 “ Prince Ferdinand's orders, the opinion of the court was de-  
 “ sired thereupon; and the matter having been fully under  
 “ consideration, a *question* was put, whether the court should  
 “ now admit any new witnesses to prove, that Lord George  
 “ Sackville appeared to them, at different times in the course  
 “ of the day, to have been alarmed and confused, in order to  
 “ corroborate that part of Lieutenant-Colonel Stoper's evi-  
 “ dence which relates to Lord George Sackville's appearance?  
 “ And the court is of opinion in the *negative*, because that  
 “ appears to the court to be a circumstance which may ma-  
 “ terially operate in support of the charge. Another question  
 “ was

the evidence of the charge, but to which that evidence was not directed, the prosecutor

"was then put, whether the court should admit evidence in confirmation only of Lieutenant-Colonel Sloper's having declared to the same effect, as in his deposition now before the court, at the time, or within a short time afterwards? and the court is of opinion in the affirmative, because the credibility of Lieutenant-Colonel Sloper's evidence does appear to the court in some respects to be impeached by Lord George Sackville." *Trial of Lord George Sackville, &c.*

With respect to the above case, may it not be questioned, whether the distinction made by the court in these two opinions is not rather specious, and merely verbal, than solid or substantial? For allowing that the credibility of Lieutenant-Colonel Sloper was the only point to be established, the examination of new evidence to the facts stated by him, was certainly the most effectual mode of establishing that credibility, though the necessary consequence of that examination might be to corroborate the charge. The court, therefore, by refusing to examine new evidence, to those facts, did in reality refuse to allow the best means of establishing Lieutenant-Colonel Sloper's credibility. On the other hand, by allowing evidence to be examined in proof of Lieutenant-Colonel Sloper's having at the time, and within a short time afterwards, declared to the same effect, they in reality allowed what was very strongly to operate in support of the charge, viz. the re-establishment of a most material witness to his entire credibility. In short, no new proof can be in any wise material to be brought by a prosecutor, but what must in its tendency operate in support of the charge. The only question, therefore, for the court to determine, when the prosecutor demands such

secutor is allowed to examine witnesses to that new matter: as, for example, a prisoner is charged with an act of mutiny, and the charge is clearly proved; but the prisoner in his defence alledges, and adduces evidence to shew, that he was compelled by others to the commission of the act, against his own will, and at the hazard of his life. This being new matter, to which the former evidence for the prosecutor does not in the least apply, the prosecutor is allowed to redargue it by the examination of witnesses, or the production of such documents as he thinks fitted to disprove it. In such cases, it is customary for the court to allow the prisoner the liberty of a rejoinder, or answer to the prosecutor's reply; an indulgence to which, in ordinary cases, he is not entitled.

such evidence, seems to be, whether the prisoner has not by the mode of his defence rendered such evidence absolutely necessary? And this it must be in every case where either the *credibility* or the *veracity* of the witness has been impeached, (for the distinction has no solidity), or where *new and relevant matter* has been introduced by the prisoner in his defence.

## CHAP. VI.

*Of Evidence.*

IN the trial of military crimes by Courts-Martial, the rules of evidence, which have their foundation 'in the principles of justice and of reason, are the same that apply to the trial of crimes before the civil courts. It is therefore of essential consequence, that the general doctrine of the Law of Evidence should be understood by all military persons, who may either be called on to discharge the important function of judges in a military tribunal, or to sustain the more painful character of parties in its proceedings.

Definition of  
Evidence.

Evidence is that which either proves and demonstrates, or which renders highly probable and worthy of credit to a court of jury, the facts or points in issue before them.

What

What has no tendency to establish the facts or points in issue, is therefore no evidence, and ought not to be admitted by a court.

But in circumstantial and presumptive evidence, circumstances which have not an immediate and direct tendency to prove the very facts in issue, may have an indirect and consequential tendency to that effect, and are therefore not to be disallowed by a court, provided the party who urges them shall make their consequence apparent.

Evidence is of two kinds, viz. 1st. *Viva voce*, or parole-evidence, given by witnesses in court; and 2d, Written evidence, by records, deeds, and other authentic and probative papers. Of these two species of proof it is necessary to treat separately, first premising certain rules relative to evidence in general.

It is a general rule, that, in all cases, the best evidence of which the matter is capable shall be resorted to, provided that evidence can be brought. If that is impossible,

General rules  
relative to evi-  
dence.

sible, the court will require the best evidence that can be had: "For if it be  
"plainly seen in the nature of the trans-  
"action, that there is some more evidence  
"that doth not appear, the very not pro-  
"ducing it is a presumption that it would  
"have detected something more than ap-  
"pears already: and therefore the mind  
"does not acquiesce in any thing lower  
"than the utmost evidence the fact is ca-  
"pable of." *Baron Gilbert's L. of Evid.*

All evidence for and against the facts in issue is to be weighed, and judgment given according to that which preponderates. In the balancing of contrary evidence, the mind is to be guided by no other rule than this, That assent must be given to that testimony, of whatever nature it be, which produces the strongest belief. Thus, if one single witness of sufficient credibility, who had the best opportunity of knowing the truth, shall swear positively to a fact, and his testimony shall be encountered by two other witnesses, whose credibility is more suspicious, or whose opportunity of know-  
ledge

ledge was not so great; the testimony of the single witness producing stronger belief than that of the others, ought to preponderate.

On the same principle, a testimony which is precise and circumstantial, must outweigh that which is less particular or minute, and goes only to a general fact; because the former implies more attentive observation or more pointed recollection, and therefore creates a stronger belief.

From this principle, likewise, it follows, that positive evidence must outweigh that which is negative; for the former being the result of attention and observation of the facts, can never be encountered or disproved by that which may have arisen merely from the want of such attention and observation. Thus, supposing two credible witnesses shall depose pointedly to certain words spoken by A, as, that he called B a scoundrel; and two or three others of equal credibility shall swear, that though high words were used, they did not hear that particular expression; the



former evidence ought to preponderate over the latter.

The weight of a witness's evidence does not altogether depend upon the words which he utters upon oath, but often greatly upon the manner in which his testimony has been delivered. Thus the testimony of a witness who appears evidently to be influenced by his passions, in giving his evidence on either side of a cause, is of much less weight when swearing to facts which favour that side, than the evidence of another who exhibits no such bias; and conversely, the testimony of a witness swearing to facts which make against that side to which his passions evidently incline him, is entitled to the greatest weight. For this reason, the testimony of a person who voluntarily offers himself to be an evidence is always suspicious, as arguing a strong bias of passion or of interest.

Even the countenance, looks, and gesture of a witness, add to, or take away from the weight of his testimony. It is therefore necessary, that those external criterions

terions of veracity should not only be carefully attended to, but should be guarded pure, and free from every endeavour of parties interested to warp, disguise or suppress them. Hence all attempts to brow-beat, perplex, or irritate a witness in the delivery of his testimony, are most reprehensible; and a court is not only deficient in a proper feeling of its own dignity, but positively in its bounden duty, if it does not repress such conduct with exemplary severity. As all attempts of this kind affect the weight of the evidence, they are, in fact, nearly allied to the punishable crime of subornation of perjury.

It is an idle question, which has been disputed by many writers on evidence, whether the greatest weight is to be given to *written* testimony, or to that which is delivered *viva voce* upon oath by a witness? The question admits of no general answer; for the superior weight of each mode of proof depends on the nature of the fact or matter at issue. Thus, if the point at issue were, whether A were a member of

a certain corporation, the written records of the corporation would be préférable evidence to the testimony of witnesses swearing to his election on such a day, or the contrary. But if the question were, whether A did not stab B with a sword on such a day, and in such a place, the testimony of witnesses present at the encounter, would outweigh any written evidence brought to prove that A was in a different place at the time; as the minutes of a society of which he was a member, the date of a letter from him bearing to be written from another place, &c. In both these cases the weight is given to that species of testimony which is *the least liable to error or corruption*. In many cases, the evidence is compounded of both species of proof; and, as the one sometimes encounters the other, it is necessary to adopt this principle for determining to which of the two we ought to give the greatest weight.

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Of

*Of Viva Voce, or Parole Evidenec.*

THE law holds, that all persons who appear to have sufficient wisdom and discernment, and who, from their general character, are presumed to have a proper sense of the sacred obligation of an oath, are capable of being witnesses in a court of justice. Hence it follows, that where these essential requisites are found, and the witness understands, or can be made to understand the subject to which his testimony is required, and feels his obligation to speak the truth, it matters not of what country he is, or what language he speaks (if his meaning can be conveyed to the court); nor of what age he is; nor of what religion, provided he acknowledge a God, and be willing to bind himself by the requisite solemnity of an oath.

But the law positively excludes certain persons from giving testimony in a court of justice; and these may be reduced to four classes. 1. Those who have an interest

Who may be  
witnesses

Persons ex-  
cluded from  
giving testi-  
mony.

terest in the matters at issue. 2. Those who stand in a certain relation to the parties in the cause. 3. Those who have committed crimes which destroy their credibility, or, who are stigmatized by law. 4. Those who want sufficient discernment and understanding.

1. Interested  
persons

1. Of those disqualified through interest in the cause, the chief is the party, either prosecutor or defendant, who cannot be allowed to give evidence *for himself*; but he is the best witness that can be *against* himself. This rule, however, is to be understood only of those who are to make actual gain, or suffer loss by the issue of the suit; for in many cases of a criminal nature, and where the object is not gain, or the avoidance of loss, but the punishment of a crime, the informer and prosecutor is allowed to give evidence against the party accused; one principal reason for such practice being the necessity of circumstances; for otherwise, many crimes would escape unpunished from the want of evidence. Thus, in civil courts, the party

party who suffers a robbery, a rape, or an assault, is allowed to give evidence upon oath against the offender; and in trials before Courts-Martial, a private party, who is accuser, and who sustains the character of prosecutor upon the trial jointly with the Judge-Advocate, is allowed, provided he have no direct gainful interest in the prosecution, to give his own evidence upon oath in support of the charges. In every such case, however, where there may be room to suspect unfavourable prejudice, though no direct interest should be apparent, the jurors, who in all trials weigh their evidence, and appreciate its credibility, will give to the testimony of a prosecutor only such measure of credit, as they conceive it to deserve. In all cases, the prosecutor may be called upon to give evidence in favour of the prisoner, or to produce records or papers of any kind which may be necessary for the prisoner's defence.\* The informer on a penal

\* See the Judge-Advocate General's opinion on the trial of the Honourable Lieutenant-General James Murray, Governor of  
of

nal statute, who, by law, is entitled to a part of the penalty, having a pecuniary interest in the suit, cannot be allowed to give testimony; though to this rule there are some exceptions, by particular and express enactment of the statute.

That is equally an interest which exempts from loss, and which entitles to gain. Those who have given bail cannot therefore be witnesses for their principal. On the same *ratio*, the master of a ship being prosecuted for running over and sinking a barge, the evidence of the pilot was rejected, because he was answerable, if faulty in steering, to the master. But the law holds, that the gain or loss must be immediate and certain, and not con-

the.

of Minorca; which is, in substance, that the accuser and prosecutor is entitled to give his own evidence in support of any of the charges. And accordingly, Sir William Draper, who stood in that character upon the trial, gave evidence upon oath, touching one of the charges which accused General Murray of personal wrong and injustice to him (Sir William Draper). So likewise, on the trial of the Honourable Major H. F. Stanhope for the surrender of Tobago, Governor Ferguson, who was accuser and prosecutor, gave his own evidence, at great length, in support of the charges; and the practice is extremely com-

mon.

tingent

tingent or barely possible. So it has been adjudged, that an *heir-apparent* might be a witness to prove the titles of lands, (but a *remainder-man* could not.

Yet if the gain, though immediate, is such as cannot be supposed to influence any man of honourable principles to swear contrary to the truth, or even to give a biassed testimony, a court of justice will not repudiate his evidence. Thus, the steward of a manor was admitted to prove that, by the custom of the manor, certain fines were due on the death of the lord / his heir, by the tenants, who were then re-admitted, notwithstanding it was objected that the steward had fees on the re-admission. On the same principle, in Courts-Martial, inferior officers, who may gain promotion or rank by the conviction of their superiors, are not on that account excluded from giving testimony against them.

It has been adjudged, that the interest which amounts to a disqualification must be the obtaining of some actual profit bettering



tering the witness's estate, or the immediate prospect of such profit; not the interest of establishing a higher character, or extenuating himself from a charge of misconduct or neglect.\* But this distinction has no foundation in reason or in good sense; for a man's character and reputation for good conduct is his most valuable estate; and to protect these from injury is his dearest interest; which therefore must give the strongest bias to his testimony in every case where these are concerned..

The judges of the court and the jurors† may be sworn as witnesses for any of the parties; for they can have no interest in the issue of the trial, and no bias of any kind to give evidence against the truth.

A person who either receives or has been promised a pecuniary reward, or a benefit of any kind, whatever, to himself, to his family or friends, or who receives, or is promised the release of any obligation by the party who calls for his testimony, is

\* Espinasse on *Nisi Prius*, p. 707.

† Hawkins's P. C. 432. Bacon's Abr. vol. 2. p. 256.

disqualified on account of his interest in the suit.

A person who has been threatened with vengeance of any kind, or any manner of mischief to himself, if he should refuse to give evidence in a certain way, is an incompetent witness for the party who has so threatened him. And reason urges, that his testimony *against* that party, though not absolutely inadmissible, is yet very suspicious, from the obvious motive of revenge and malice.

A person cited as a witness for a defendant is rejected on account of interest, if he is either a party in a similar cause actually in dependance, or is liable to prosecution on the same grounds, or for the same offence; for he is evidently prompted by interest to swear favourably for the defendant, that his acquittal may rule his own case.

The necessity of circumstances requires, in many cases, that the evidence of interested persons should be admitted: As, for example, in occult crimes, or where  
there

there is a penury of evidence. Thus, as before observed, the person who is robbed, ravished, or assaulted and beaten, is not disqualified from giving evidence; for otherwise the criminal might often escape detection and punishment. But such evidence is always of a suspicious nature, and is not *per se* sufficient for conviction. On the same ground, the testimony of an accomplice or *socius criminis*, who is pardoned, must often be resorted to for the discovery and punishment of crimes; but it will in no case merit the same weight with that of an unprejudiced and impartial witness.

In many cases, the disqualification of interested persons is taken off by special statute. Thus, in actions brought against church-wardens, &c. for embezzlement of the poors-money, the evidence of the parishioners is admissible by statute. So, by the statutes for apprehending highwaymen and burglars, the persons so doing are legal witnesses, though they are entitled  
to

to a reward; for the necessity of circumstances requires their testimony.

For the same reason of necessity, it is adjudged, that where it is apparent that a statute-law could receive no execution, unless a party interested were to be admitted as a witness, there he must be allowed; for the law must not be rendered ineffectual by the impossibility of proof.\* The statute in this case may be said to abrogate the common law for a just and necessary purpose. And in general where that purpose is apparent, and the circumstances of the case are such as absolutely to require the evidence of parties interested, for the detection and punishment of a crime, there such witnesses must be admitted; the court and jury giving to their testimony such credibility as they judge it to deserve.

It has been already said, that the confession of a party, of the crime for which he is tried, is conclusive evidence against himself.

\* Gilbert's Law of Evidence, edit. 4. p. 128.

2 Persons related to the parties.

2. Those who stand in a certain relation to the parties in the cause are disqualified from giving evidence.

“The strongest of those disqualifying relations is, that of husband and wife; for these being in the eye of the law but one person, it were the same as a party giving evidence in his own cause; besides, they are presumed to be under the strongest bias of affection and influence; and even where that presumption is manifestly excluded, the departure from this rule would lay the foundation of rancour and family disquiet, and so be hostile to the sacred institution of marriage. Husbands and wives, therefore, can neither be witnesses *for* nor *against* each other in any action.

This rule applies, however, only where one of the married persons is a *party* in the action: for the wife may lawfully give evidence in a suit or trial between other persons, of which the issue may be contingently beneficial or disadvantageous to her

her husband, and *vice versa*\* : though the credit of such testimony must of course be suspicious.


The general rule is dispensed with in cases of necessity. As where the husband is prosecuted for a forcible marriage ; or where the husband and wife have cause to demand sureties of the peace against each other. And in Lord Audley's case, the wife was allowed to give evidence to prove his assisting in a rape upon her. But upon this last case Ch. Baron Gilbert observes, that " this piece of law hath since been exploded, that in a personal wrong done to the wife, the wife may be an evidence against the husband ; because it may be improved to dreadful purposes, to get rid of husbands that

Thus Mrs Perreau, whose husband was under a capital conviction for forgery, being called as a witness on the trial of her husband's brother for the same crime, and he asked, if she did not expect that the conviction of the prisoner would contribute to procure her husband's pardon she said, *she hoped it might* It is it was held tender to affect the credit of her testimony, but did not render it incompetent.

“ prove uneasy, and must be a cause of  
“ implacable quarrels, if the husband  
“ chance to be acquitted\*.”

“ It has been adjudged in some cases, that  
a husband and wife may be witnesses  
against one another in trials for treason;  
but the contrary has been likewise found,  
and seems to be the better judgment†.

It is generally held to be law, that no  
other relation of kindred but that of hus-  
band and wife is excluded from giving evi-  
dence; and therefore, that parents may be  
witnesses for and against their children, and  
*vice versa*; and children of the same parents  
for and against each other. But this doc-  
trine is repugnant to the principle and  
foundation of evidence; for such testimony,  
*per se*, is not sufficient to produce belief  
or conviction in any matter of doubt, or of  
material interest, there being such strong  
motives of favour and partiality. If the  
law, therefore, does not absolutely reject

 Robert's Law of Evidence, edit. 4. p. 134.  
\* Bacon's Abridg. vol. 2. p. 286.

such testimony, the court or jury will receive it under all its circumstances of suspicion, and give it no more weight than it is entitled to. The Roman law, with more wisdom than ours, held such evidence altogether inadmissible.

A servant in the cause of his master, Servants. though not an inhabile, is yet a suspected evidence.

Counsel, and attornies or solicitors, cannot in any case be called upon to give evidence which may disclose the private business or secrets of their clients; but as the evidence of a necessary or important witness might thus be taken off by giving him a fee, it is now understood to be the rule, that a counsel or attorney must be asked the previous question, whether he possesses the fact of his own knowledge, and previous to his retainer, or has learnt it from his client; and the witness will give his answer agreeably to that distinction. For example, supposing the question were concerning a rasure of a deed or writing of any kind, he may be asked,

Counsel and  
attornies



whether he ever saw such deed or writing in a different plight, for that is a fact which he possesses of his own knowledge ; but he must not be examined as to any confessions which his client might have made to him respecting it'. So he may be examined as to the true time of the execution of a deed, or whether he saw a party sign.

On the same principle, counsel and attornies are not obliged to produce papers which may have been delivered to them by their client, as evidence against him. Thus an attorney being subpoena'd, and called to produce certain vouchers, which were to found a prosecution for forgery against his client, was found not obliged to obey the subpoena.

But this privilege is strictly confined to attornies or counsel acting in the cause, and cannot be extended to others, though professionally and confidentially employed. \*Nor is it extended to persons of other

\* Lord Say and Sele's case, *Mic. 10. Ann.*

professions,

professions, though confidentially trusted by a party in a cause.

3. Those who have committed crimes which destroy their credibility are excluded from giving testimony in a court; as are also certain classes of persons stigmatized by law.

3. Those who are infamous on account of crimes & stig-  
matized by law

The crimes which are held to destroy the credit of testimony, are felony, and the *crimen falsi*, as perjury and forgery; because these crimes destroy a man's moral reputation, and are understood to be the result of such wickedness or depravity as would render void the obligation of an oath; and to these is added treason, on account of the atrocity and danger of the crime, which it is expedient, by every means, to stigmatize and render odious. So likewise a person convicted of a conspiracy is an inadmissible witness.

Persons convicted of felony or of perjury, though pardoned, cannot be received as witnesses; for the pardon, though it remit their punishment, cannot wash out their moral turpitude. But a person con-

victed of treason, and pardoned, may be considered as restored to his reputation; for his crime is presumed to have arisen from an error in judgment, and the receiving of a pardon is held to be a pledge of his future allegiance.

It is the commission of the crime, and not the nature of the punishment, nor the suffering of that punishment, which makes the party infamous. Thus a conviction of barratry, or the stirring up of law-suits, a crime of a nature equally infamous and pernicious, has been adjudged to render the perpetrator incapable of giving evidence, though the punishment was only a fine. Yet it may be questioned, whether a punishment of a disgraceful and infamous nature, having the effect of debasing the character and destroying the reputation of the sufferer, ought not to incapacitate from giving testimony; as, for example, standing in the pillory\*, whipping, if

\* Yet even this punishment, in general so disgraceful, if inflicted for libellous expressions or scandalous words spoken  
against

if inflicted by the sentence of a civil court, &c. As whipping, however, is a military punishment, which is often inflicted for small failures in duty, and is to be looked upon rather in the light of a wholesome chastisement than an infamous punishment, it ought not to render a soldier an incompetent evidence; though, according to the nature of the offence for which it has been inflicted, it may affect the credibility of his testimony.

A conviction for perjury, even though followed by a pardon, ought for ever to incapacitate the convict from giving evidence, because he has furnished demonstrative proof that he is insensible to the sacred bond of an oath. And therefore it is a most absurd distinction, which has been drawn by some writers on evidence, and even confirmed by judgments of the courts, that “on perjury at common law, “the party pardoned may be a witness,

against the Government, ought not, as Chief-Baron Gilbert well observes, to be taken as a presumption against a man’s common credibility.

“because

“ because the King has the power to take  
“ off every part of the penalty, and so dis-  
“ cern whether it is fit the offender should  
“ be restored to credibility; but if a man  
“ be indicted of perjury on the statute,  
“ the King’s pardon cannot restore his cre-  
“ dibility\*.” In neither case can the  
King’s pardon do any thing more than re-  
mit the punishment; for the crime must  
adhere indelibly to the character of the  
offender; and therefore it is to little pur-  
pose that the law should allow a testimony  
to be given which is incapable of pro-  
ducing belief.

It has been already observed, that the  
testimony of an accomplice, or *particeps*  
*criminis*, is in many cases to be received,  
from the necessity of circumstances; but  
he is never entitled to the credit of an un-  
suspected witness.

In all cases where a party would avail  
himself of the incompetency of a witness  
on account of his conviction of a crime,

it is necessary that he should produce to the court the record of conviction, or a sufficient proof of it.

No witness is obliged to answer any question, the answer to which may oblige him to accuse himself of any crime or punishable offence. But it has been adjudged, that a witness was obliged to answer the question, whether he had ever stood in the pillory? for the answer could not subject him to a new punishment\*.

There are certain classes of persons whom the law stigmatizes, and declares incapable of bearing evidence, though not convicted of any crime.

Infidels, ex-communicated persons, and Quakers.

As the sanction of an oath depends upon the belief of a God, it can have no obligation on those persons who openly deny the being or attributes of the Deity. Professed Atheists from principle, therefore, and those who from ignorance and bar-

\* *Rex v. Edwards*, 4 Term. Rep. 440.

barism have no impressions of religion\*, are justly declared incapable of giving testimony upon oath.

But it is not necessary that a witness should profess the Christian religion. Jews are competent witnesses, as are Mahometans; the former being sworn upon the *Old Testament*, and the latter upon the *Coran*. So likewise persons of other religions, provided' they solemnly swear by Almighty God, that 'they will tell the truth, and the whole truth. There is no particular form essential to the oath to be taken by a witness. "As the purpose of an oath," says Lord Mansfield, "is to bind the conscience, every man, of every religion, should be bound by that form

\* On an indictment for horse stealing, a witness was produced, and being examined, he said, he had heard that there was a God; and believed that those persons who told lies would come to the gallows; but he acknowledged that he had never learned the Catechism, was altogether ignorant of the obligation of an oath, a future state of rewards and punishments, the existence of another world, or what became of wicked people after their death. The court rejected him as incompetent. *Leach, Crown Cas.* 368.

“ which

“ which he himself thinks will bind his conscience most\*.” So Gentoos have been sworn according to the ceremonies of their religion, and admitted as good witnesses.

It is a remnant of the Popish superstition, that persons excommunicated cannot be witnesses ; for it was supposed that those who were excluded out of the church could not be under the influence of any sentiment of religion : and it being even declared unlawful to converse with such persons, they could not receive any questions from a court of justice†. By stat. 3. Jac. c. 5, Popish recusants are placed in the same condition with persons excommunicated : And both these disqualifications remain at the present day unrepealed exceptions to the competence of testimony.

Quakers, whose religious tenets debar the taking of an oath, are by special sta-

\* *Atcheson v. Everett*, Cowp. 382. Ill.

† The grounds of excommunication are heresy of every species, simony, incontinence, and perjury in ecclesiastical courts.



tute<sup>b</sup> allowed to give evidence in *civil* suits upon their simple affirmation, “I do solemnly, sincerely, and truly declare and affirm:” But by a distinction for which it is impossible to assign any reason in common sense or expediency†, they cannot be admitted as witnesses on any affirmation however solemn, in any *criminal* suit.

4. Persons who want discernment or understanding.

4. Those persons who want sufficient discernment and understanding, are inadmissible as witnesses.

Infants, and children of tender age, are excluded from giving testimony, on account of defect of understanding; but as the opening and growth of the understanding is very various in different individuals, the law has fixed no determined age for their admissibility as witnesses. A

† 8th Geo. I. c. 6.

† I am warranted in this assertion by a great authority. “If a quaker be indicted of a capital offence, he cannot now<sup>2</sup> call quakers as witnesses in his behalf. It is not possible to say why the exception was made; yet since made, it must be followed.” *Lord Mansfield, Atcheson v. Everett, Cowp.* 384.

child

child of nine years of age has been allowed to give evidence; but the credit to be given to such testimony must always rest with the court and jurors.

Idiots and insane persons are utterly incapable of giving evidence; though lunatics, and those subject to temporary fits of insanity, may be received in their lucid intervals. Mere weakness of understanding does not render a witness incompetent, though it may discredit his evidence. Persons deaf and dumb from their birth may be admitted as witnesses; provided they are capable of distinct information by means of arbitrary signs, and are able, either by writing or by signs, clearly and unequivocally to express their knowledge of facts, or make their testimony plainly intelligible to a court; and provided likewise they can give clear intimation that they understand the moral and religious nature of an oath.

*Of Written Evidence.*

~~Public~~  
Evidence.

Written Evidence is of two kinds ; public and private. Public is, 1st, Records or memorials of the legislature and of the King's courts of justice ; and 2d, Public matters of inferior nature. Records are either acts of Parliament, or authenticated proceedings of the courts of record ; all of which it is evident must give the greatest faith, and be received as complete proof, in any court, of the facts or matters which they contain. But as the original records themselves cannot be transferred from place to place for private purposes, authenticated copies of these records must be allowed in evidence. Thus the printed statute-book is held to be an authenticated copy of all public or general acts of the Legislature, and must be received as good evidence ; but private acts are not to be received on the evidence of the statute-book : they must be compared with the record.

record. A copy of a copy is no evidence at all. The proceedings of courts of record, which are admitted as good evidence, are, judgments of those courts, and verdicts of juries, authenticated either under the proper seal; or sworn copies, that is, such as the producer swears he examined with the original; as the copy of a judgment from Scotland or Ireland, produced in a court in England. Such records are evidences of the highest nature, and are conclusive proof of the matters which they contain.

Public matters of inferior nature, which are not recorded, but which are admitted as written evidence in courts of justice, are, bills and answers in chancery; depositions, or testimonies given in writing, where the witness who made them is dead, or cannot be procured; for if he is alive, and can be produced to the court, so as to be cross-examined, the deposition must be rejected, as not being the best evidence that can be had. The rolls of a court-baron, or manor-court are good evidence relative to property

and persons within the manor. 'The register of baptisms, marriages, and burials, or an authenticated copy from it, is good evidence; and in general it is held that all books of that public nature are sufficient evidence of the matters of which they are the proper registers. 'The register of the Navy-office, with proof of the method there used, of returning all persons dead with the mark D. D. was found to be good evidence of a person's death.\* Depositions given by a witness on a former trial, cannot be received as evidence on another trial, unless the witness has died in the interim. But depositions given upon a former trial, or before a magistrate, may be read at a trial, in order to take off the credit of the witness, by shewing a variation in his testimony. 'The examination of an informer, taken upon oath, and subscribed by him before a magistrate, cannot be received as evidence on the trial, unless it is proved on oath that the informer is

\* Bull. N. P. 249.

dead,

dead, or is unable through sickness to attend the court, or is kept away by procurement of the prisoner. It is not sufficient to prove that the prosecutors have used their utmost endeavours to find him, without effect.

Private written evidence may be, books of accounts, either of parties or of third persons, receipts, discharges, bills of parcels, gazettes, or newspapers, notes of hand, and bills of exchange, letters of correspondence, &c. The presumption of the veracity of a merchant's books arises from their regularity. If that, therefore, be wanting, they ought to give no faith in judgment. At best, however, they are incomplete evidence, *per se*, in favour of the merchant or the person who keeps them; but they are good evidence against him. Letters of correspondence, and all similar writings, must be authenticated, that is, proved upon oath to be written by the person of whose writing they are alledged to be. The comparison of hand-writings, though it may be usefully employed for

Private written  
Evidence

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the

the detection of forgery, is no evidence to authenticate any writing whatever as a piece of testimony. It may, however, furnish a presumption which will weigh in the scale with other evidence.

*Of Probability, and the weighing of  
Evidence.*

A thing is probable in proportion as it agrees with what usually happens in similar circumstances. It is natural that the mind should more easily give its faith to things which are probable from most usually happening, than to matters that are repugnant to that probability; and therefore in judicial proceedings a much smaller degree of evidence ought to be held sufficient to establish the truth of the former, than is required to prove the latter. A single witness may be sufficient evidence of a probable fact, whereas it may require the concurring testimony of many to prove what is not likely to have happened in  
such

such and such circumstances. In criminal matters, it is often difficult to say whether the *probability* is for guilt or innocence; but the law with great humanity holds, that the *presumption* should always be in favour of innocence, and that no person should be convicted of a crime unless upon the strongest and most satisfying evidence. Positive proof therefore is always to be required where it can possibly be had; as the testimony of two or more impartial witnesses swearing directly to the facts — Where a proof of this kind is wanting, circumstantial and presumptive evidence must be resorted to, that is, a proof of a number of concurring circumstances, which usually attend certain facts, and which may furnish such strong motives of belief of the facts themselves, as nothing but a positive proof to the contrary can destroy. As if A and B, two persons who were known to be at mortal enmity with each other, or between whom it was known that a challenge had passed, should be observed to walk out together to a private place,

v 3



place, armed with swords, and be seen by a passenger engaged in actual combat; and afterwards A should be found dead, and B seen coming from the place with his sword bloody, or marks of blood upon his clothes. These are violent presumptions of the guilt of B, and create a belief which nothing but positive proof could destroy; as for example, the confession of C, that he had interfered between the parties when fighting, and in order to save the life of his friend B, had himself put A to death.

The credibility of a witness, is what alone gives weight to his evidence; and in judging of this credibility, many considerations must enter into the account; as, condition and rank in life, general reputation, known principles, judgment and good sense, accuracy of memory, perfect indifference to the matters in issue, and freedom from prejudice and partiality.

An unwilling and reluctant witness, who speaks with caution, answering nothing but what is forced out of him by repeated  
and

and circuitous interrogation, is unworthy of the same credit that is given to one who openly and fairly declares all that he knows upon the point. On the other hand, a witness who amplifies in his testimony, unnecessarily enlarging upon circumstances unfavourable to a party, who seems to be gratified by the opportunity of furnishing condemnatory evidence, or manifestly betrays passion and prejudice in the substance of his testimony, or in the manner of delivering it, is to be listened to with equal suspicion of his veracity.

If a witness takes upon him to remember with the greatest minuteness, all the circumstances of transactions long since passed, and which are of a frivolous nature, and not likely to dwell in the memory, his testimony is thereby rendered very suspicious; as, on the other hand, a witness affirming his total want of recollection of the most material and striking circumstances of a recent and remarkable fact, which happened in his own presence, is deserving of very little credit

in those particulars which he is to remember.

In all such cases, however, the remaining mind of a juror will be at no time to separate the truth of an evidence from its falsehood; and where the former reluctantly breaks forth, he will give it the greater credit, as being the testimony of conscience, not only uninfluenced by the passions, but directly against their perverting influence.

A single  
ness.

A single witness requires much corroboration from concurring circumstances; for where there is no presumption from circumstances fortifying his evidence, the credit of that person would need to be very high indeed, whose single and unsupported testimony should give faith to any criminal accusation.

A witness ought always to shew the causes of his knowledge, for the weight of the testimony must be in proportion, not only to his credibility, but to the opportunity which he had of knowing the facts. If, therefore, a man cannot set forth

forth a probable cause of knowledge, he is not to be believed at all.

The attestation of a witness must be only to what he actually knows from his own observation of the facts in issue. He is not to be examined as to what he has heard, or been informed by others; for his testimony being in that case a reference to the information of another who is not upon oath, is not legal evidence at all. Yet a witness may swear to a report, or that so and so other persons have said, (for it may be material to prove that there was such a report,) though he can give no evidence to the truth of the matters reported. So likewise, though hearsay is no direct evidence of the truth of the things said or related, yet it may be brought collaterally in support of a witness's testimony; as if a person should swear that he heard the witness frequently tell the story which he has now given upon oath, to various persons at the time, and with the same circumstances: or it may be brought  
to

to discredit that testimony, by proving that the witness said directly otherwise to many persons at the time.

Questions of  
opinion.

In general, facts are the only subject of evidence, and not opinions; for it is perhaps only of matters of fact that there can be absolute certainty or truth: Facts are positive, determinate and immutable; but opinions are not only various, but mutable. It is therefore only to the truth of *facts* that evidence is regularly brought; and to form *opinions* on these, is the province, not of the witness, but of the judge or juror who is to decide upon them. No party in a trial is therefore entitled to obtrude the opinions of a witness upon the court or jury, or to call upon a witness to answer questions of opinion. Yet there are cases in which a juror may desire the opinion of a witness on certain points, in order to regulate his own final judgment or verdict: and the court, if it sees the propriety of that desire, will call upon the witness to give his opinion. This has frequently occurred  
upon

upon Courts-Martial\* ; and there are indeed certain articles of the Military law, upon

\* On the trial of Lord George Sackville, where the charge against the prisoner was general, viz. the disobedience of orders given by the Commander in chief relative to the troops under the prisoner's command in the battle of Minden ; which disobedience was to be inferred from the mode of executing a variety of operations " in marching, counter-marching, and " attacking the enemy ;" it is evident that the witnesses called to give evidence with respect to those<sup>2</sup> operations, must, in many cases, have been required to give their own opinions as to their complete or imperfect execution. Accordingly, many questions of opinion were put and answered upon that trial ; and the court came to a general resolution upon the propriety and admissibility of such questions as follows : The question being put to Captain Smith, Whether he thinks the early repeated orders of Prince Ferdinand to support the infantry were fully executed by the cavalry then forming themselves in one line behind this body of infantry ? A. " That can only be " a matter of opinion of his : He is willing to answer any " question in the world to a point of fact ; he wishes he was " more able to deliver himself so that the court might be able " to form any opinion they would wish." The witness, upon the question being again proposed, excusing himself for the reason above alledged, and the court being thereupon desired by Lord G. S. to decide how far a witness should be allowed to speak to matters of opinion, took the same into consideration, and came to the following resolution : " The court has considered the matter upon which a doubt was suggested, and is clearly of opinion, that it is not only regular, but in many cases necessary, to ask the opinion of a witness as collected from

upon which if a person is tried, there is a strict propriety, and even necessity, for the witnesses answering questions of opinion: As, for example, if an officer is arraigned under that article of war which punishes with discharge from the service all such scandalous or infamous behaviour as is unbecoming the character of an officer and a gentleman, it is obvious, that it may be in such a case absolutely necessary to make a witness declare his opinion of the prisoner's conduct. So likewise, if an officer is

from the circumstances which appear to him at the time; but under what circumstances they will require an answer from a witness, will always be in the discretion of the court; and in the present case the question is not insisted upon." Questions of opinion were on similar grounds allowed to be put to the witnesses on the trial of the Honourable Colonel Stanhope for the surrender of Tobago, and on many other trials by Courts-Martial. In the trial of Lieutenant-Colonel Cockburn for the surrender of St. Eustatius, the prosecutor, Lieutenant Rogerson, put the following question to one of the witnesses, "As an officer of experience, did Colonel Cockburne, in your opinion, shamefully abandon and give up the garrison, posts, and troops that were under his command?" This question, of which the tendency was to make the witness give his judgment on the proof of the whole matter of the charge, was not allowed by the court to be answered

accused

accused of behaving with contempt or disrespect to his General, of being found drunk on duty, of quitting his division or post without necessity, &c. all these are cases in which opinion is so combined with fact, that it is either impossible that they should be separated in a witness's testimony, or unfit that they should be so: but, as already said, the court is, in all questions of this nature, to determine as to the propriety of questions of opinion being put and answered. With regard to questions of doubtful propriety, the best rule that can be followed is, That every thing which, on the part of the prosecutor, tends to support or give credibility to the charges, is admissible evidence; as is likewise, on the part of the prisoner, every thing that has a tendency to invalidate or discredit them; though in both cases the tendency in either way should be but remote.

It frequently happens, that the tendency of a question put to a witness may be to the prejudice of a third person who is no party to the trial. This consequence ought  
in



in justice and humanity to be avoided wherever it is possible; and in no case ought the *prosecutor* to be allowed this liberty of indirectly impeaching or affecting the characters of third parties; because It cannot be necessary to his purpose; but it may sometimes happen that the *party accused* may find it absolutely necessary in defence of himself, to throw blame, and even 'criminality on others who are no parties to the trial: nor can a prisoner be refused that liberty, which is essential to his own justification. It is sufficient for the party aggrieved, that the law can furnish ample redress against all calumnious or unjust accusations.

Witnesses may be called to support the credibility of witnesses; either By giving testimony to their general good character, or to their knowledge or acquaintance with the facts in issue, or to their having invariably related facts in the same manner.

If, therefore, the credibility of any of the witnesses, either for the prosecutor or prisoner, is impeached by the opposite party,

ty, it becomes proper to re-establish their credibility by examining new evidence thereto\*.

*How Witnesses are to be brought, and to give their Evidence.*

All military persons are bound by their duty to attend and furnish testimony in all military courts, whenever required so to do by a proper authority. This authority is contained in the warrant for assembling the Court-Martial; and in consequence thereof, the prosecutor and prisoner must respectively summon or give warning to those persons who are necessary evidence, of the time and place of the meeting of the court, and make requisition of their compearance to give testimony.

If the witnesses should be persons in a civil capacity, who are not subject to military authority, nor bound to obey its citations, it is customary for the party who

\* See *supra*, p. 254.

requires

requires their evidence, to resort to the aid of the civil power, through the medium of the Judge-Advocate, who, upon applying to the proper magistrate, and setting forth the necessity of the case, obtains a *subpoena* or summons, compelling the attendance of the necessary witnesses, under the usual penalty.

It is declared by the Mutiny-act, Sect. 18, that, all witnesses duly summoned to attend a Court-Martial, are, during their attendance on the Court, and in going to, and returning from the same, privileged from arrest, in the like manner as witnesses attending any of the King's Courts of Law; and if such witness should be arrested, he shall be discharged of the arrest by the Court, by whose warrant it was issued, upon affidavit made of the circumstances in a summary way.

By the same Section of the Mutiny-act, it is declared, that, witnesses, who, after due summons, shall refuse or neglect to attend on Courts-Martial, shall be liable to civil prosecution for that breach of the  
Law,

Law, in the same manner as if they had refused or neglected to attend on a criminal trial in the Civil Courts of Justice.

In general, military persons are not allowed any sum, in name of charges or expences, for their attendance upon a Court-Martial; because such service is held to be a part of their professional duty. Yet, as it is reasonable and just, that any extraordinary charges which a witness may have been put to in the performance of his duty, should be considered and defrayed; as if a subaltern officer should be obliged to leave his quarters, and travel to a great distance, and in the middle of winter, which of necessity would occasion much extraordinary expence; so it is not unusual to allow the reimbursement of such charges in the general expenditure on account of the Court-Martial. But witnesses in a civil line of life are by law entitled to all their reasonable charges actually expended, and even to a recompence for the cessation of their usual gains.

All witnesses must be regularly sworn in

presence of the court and of the parties, and give their testimony likewise in presence. In Courts-Martial, the testimony of the witness is to be taken down in writing, as nearly as possible in his own words, and read to him for his approval or correction, after his deposition is closed\*.

Although a Peer sitting in judgment on trials in the House of Peers does not give his verdict upon oath, yet if called on as a witness in a court of law, he must be sworn in the ordinary form.

All objections to the competency of a witness must be stated in open court; but as a Court-Martial never deliberates with open doors, the court must be cleared in

\* It has been sometimes customary in Court-Martial, when a material witness has been confined by sickness, to send a deputation of certain members of the court, to examine him, and take down his deposition in writing; but the practice is most erroneous, and has been deservedly reprobated wherever it occurred, by his Majesty's entire disapprobation of the proceedings, on account of such irregularity. In an emergency of this kind, there seems to be no other safe resource, than for the whole court and parties, to adjourn to the house and bed-chamber of the sick person, and there take down his evidence in the usual form.

order to weigh the import of the objection; and when the court have come to a resolution, it is afterwards communicated in open court to all parties.

A witness in a general Court-Martial gives his testimony, (as in every other court which is competent to examine evidence upon oath), under certification of incurring the penalty of perjury, if he wilfully falsifies or departs from the truth in any matter essential to the issue of the cause. "Perjury," says Chief-Baron Gilbert, "may be punished at common law in any court that hath authority to examine the cause in relation to which the perjury is committed; for it were preposterous that they should give a court authority to examine upon oath, and not to punish the violation of that oath." If therefore a wilful perjury is committed in his testimony, by a person subject to the military law, there is no doubt that a Court-Martial, by their own power, can immediately inflict such discretionary punishment on the offender, as they may judge suitable

ble to the offence. If the perjury is committed by a person not under military authority, but who is brought to give evidence in a Court-Martial, the court will direct either the party injured or the Judge-Advocate, as public prosecutor, to indict the offender before the Civil court; and in such case, the statute 23d Geo. II. c. 11. enacts, that in the indictment it shall be sufficient to set forth the substance of the offence, and before what court or person the oath was taken. (averring such court or person to have a competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth any part of the record or proceedings.

Subornation of  
Perjury.

Subornation of perjury, or the procuring of witnesses to swear falsely, stands on the same footing with ;

## CHAP. VII.

### *Of the Judgment and Sentence of a Court-Martial.*

THE last stage of the trial before a Court-Martial, is the exercise by the court of its judicative function, in the return of a solemn verdict on the guilt or innocence of the prisoner, and pronouncing sentence; and this is to be done with shut doors, after the parties, and all indifferent persons, have been ordered to withdraw.

As the court is now in possession of the whole evidence, which has been carefully reduced into writing by the Judge-Advocate as recorder of the court, together with all arguments upon the evidence, both on the part of the prosecutor and prisoner, it is customary, before proceeding to deliberate upon the judgment, that the court should hear the proceedings read

The proceedings must be read over to the court.

x 3

over



over by the Judge-Advocate, which answers the double purpose of bringing the whole body of the evidence, in one connected view, to the recollection of the members, and ascertaining the accuracy and fidelity of the record, by comparing it with the notes taken by individual members in the course of the trial.

In complicated cases, in circumstantial proofs, in cases where the evidence is contradictory, or in trials where a number of prisoners are jointly arraigned, as on charges of mutiny or the like, it is expedient that the Judge-Advocate should arrange and methodize the body of the evidence, applying it distinctly to the facts of the charge, and bringing home to each prisoner, where there are more than one, the result of the proof against him, balanced with the evidence of exculpation or alleviation. In ordinary cases, a charge of this kind from the Judge-Advocate is not so necessary.

Deliberation  
and judgment  
of the court

Where there are distinct and separate charges, or articles of accusation, the president

sident and members of the court reason and deliberate separately on each charge; candidly discussing, in a free and open conversation, the import of the evidence, and allowing its full weight to every argument or presumption in favour of the prisoner; and being thus ripe for decision, the Judge-Advocate puts the question of, Guilty or not guilty of the charge, to each of the members, beginning with the youngest\*, and so progressively up to the president, and writing down from the mouth of each person, his vote or opinion, for acquittal or conviction. The votes are then counted, and if the majority declare the prisoner not guilty, he is accordingly acquitted. If, on the other hand, the majority declare the prisoner guilty, the court proceeds next to determine what punishment shall be awarded, and to pronounce their sentence for its infliction. The opinions or the votes of the members are taken on this last question in the same

\*Articles of War, 16, art. 7.

manner as on the former; nor are those members who have in the previous question voted for acquittal, to be debarred from voting on the second, which is to decide the degree or nature of the punishment; for it would be most unjust, that those who thought so favourably of the prisoner's case, as to vote for absolute acquittal, should from that circumstance be precluded from rendering his punishment as mild as possible.

The

\* It is not a little surprising, that the contrary opinion should however have been laid down even by judicious writers. Mr Adye, (and after him Mr. Sullivan,) says in express words, "If it appears on the casting up of the votes, that the majority declare the prisoner guilty, those who have found him so, (for it cannot be supposed that those who have found him not guilty would assign him a punishment,) are to pass sentence or judgment on him." Let us for a moment attend to the consequence of this doctrine. Suppose a general Court-Martial to consist of sixteen persons, seven of whom vote for the absolute acquittal of the prisoner) and nine declare him guilty. The question remains, what shall be the punishment? And in this question, according to those writers, the seven who voted for acquittal have no vote; of the nine members who vote in the question of punishment, five vote for cashiering, the other four for a temporary suspension or a reprimand. The prisoner, if condemned by these five voices, must

The punishments which it is in the power of a Court-Martial to inflict, are various in their nature and degree, from the highest, which is Death, down to those of the lightest nature, as a short confinement for a private soldier, or a reprimand for a commissioned officer.

Military punishments.

Death.

It is humanely provided by the mutiny-act, that no sentence of death shall be pronounced against any offender unless nine of the members where the court consists of thirteen, or two thirds where the number of the members is greater, shall concur in that sentence. In some particular cases, the Articles of War point out the express punishment to be awarded in

must suffer the highest punishment next to death, while eleven of his judges think so favourably of his case, that the greater part of that number are for his absolute acquittal, and the rest for the lightest possible punishment. Can it be doubted, that had those members who voted for acquittal, known that this was to be the consequence of their vote of mercy, they would not all have rather adjudged him guilty, in order to reserve their power of mitigating his punishment? On these principles of common sense, we must reprobate the doctrine of the above-mentioned writers, as equally contrary to reason and to material justice.

consequence

consequence of certain acts; as thus:  
“ Every officer who shall be convicted  
“ before a general Court-Martial, of hav-  
“ ing signed a false certificate relating to  
“ the absence of either officer, non-com-  
“ missioned officer, or private soldier, shall  
“ be cashiered.” Art. of War, sect. 11.  
art. 10. So likewise in the case of an offi-  
cer knowingly receiving a deserter from  
another corps, without confining him and  
giving notice to the regiment to which he  
formerly belonged, sect. 6. art. 2. In such  
cases the court has no discretionary power,  
but must pronounce the sentence which  
law requires, wherever the fact is proved.  
There are but two instances in which a  
capital sentence is decreed by the Articles  
of War, without a discretionary power to  
the court of commuting the punishment.  
The one is contained in the 12th article of  
the 14th section. “ Whosoever of our  
“ forces employed in foreign parts shall  
“ force a safeguard, and shall be con-  
“ victed thereof by a general Court-Mar-  
“ tial, shall suffer death.” The other is

in the case of a deserter returning without leave from transportation. In all other cases of the highest criminality, as, committing mutiny, striking a superior officer, giving intelligence to the enemy, &c. as the offences admit of greater and less degrees of criminality, according to the circumstances that attend them, so the Articles of War allow a discretionary power; decreeing "death, or such other punishment as by a general Court-Martial shall be awarded." In crimes of a less atrocious nature, the Articles of War declare simply, that the offender shall be punished at the discretion of a general Court-Martial; omitting the word *Death*, which evidently implies, that the power of punishing capitally is excluded in such cases.

The inferior punishments are various, according to the degree of the crimes, and the rank of the persons who commit them. Of those peculiar to the rank of commissioned officers, the most severe of the inferior punishments is cashiering, that is, depriving an officer of his commission,  
breaking

breaking him, by taking from him the honourable character of a soldier, and reducing him to the station of a private citizen\*. This is sometimes done *simpli- citer*, that is, without carrying in the sentence any judgment against the offender of incapacity to be restored afterwards to his military character; or with the addition of a judgment of the court, declaring the offender unworthy or unfit to serve his Majesty in any military capacity; which is the highest of the subordinate punishments that can be inflicted on a commissioned officer.

Suspension.

2. Suspension from rank and pay, which though it does not deprive an officer of his military character,† suspends his functions and emoluments for a definite period of time, viz. a year, six months, or three

\* It would be equally tedious as it is unnecessary, to specify the military crimes which subject to the punishment of cashiering. They are very numerous, and are to be found distinctly described in the Articles of War.

† See *supra*, p. 125.

months

months from the date of the sentence, according to the measure of the offence.

3. Reprimand, public or private. A Reprimand public reprimand is inflicted by a commanding officer at the head of the regiment or corps to which the party belongs, and who are drawn out upon parade for the occasion. Its terms are not prescribed by the sentence, but are in the discretion of the Commander-in-Chief, by whose authority the sentence is put in execution, and they must be regulated according to circumstances. A private reprimand is given by the commanding officer, to the party, without the presence of witnesses.

The inferior punishments peculiar to the state of non-commissioned officers and soldiers, are corporal punishments; as whipping, imprisonment, &c. In cases of desertion, the mutiny-act declares, (sect. 4.) that when a Court-Martial shall not think the offence deserving of capital punishment, they may adjudge the offender to serve in any of the corps stationed in any of his Majesty's dominions beyond

Corporal punishments.  
Degradation.



beyond ~~some~~ for life, or for a certain term of years; with certification, that if the offender shall return into Britain or Ireland without leave, before the term is expired, he shall, on conviction thereof before a Court-Martial, suffer death. Moreover, the Articles of War specially enact for ~~certain~~ offences the degrading of non-commissioned officers to the rank of private soldiers; as for the crimes of a serjeant or corporal selling ammunition, embezzling money, &c. This power of degrading a non-commissioned officer to the rank of a private sentinel, resides at all times in the commanding officer or colonel of the regiment, and can be exercised by his own authority, on sufficient cause, without the intervention of a Court-Martial: a discretionary power which has furnished much topic of discussion, and frequent occasion of blame, but which is founded in a just and necessary policy\* ;

and

\* In the debate in the House of Commons on the Mutiny Bill in 1750, a motion was made for an alteration of the clause

and has never in practice been attended with improper consequences.

In

clause in Sect. 16. art 14. of the Articles of War, by which non-commissioned officers may be reduced to private centinels by order of the Colonel of the regiment. Much complaint was made of this, as a dangerous innovation, as an infringement of liberty, as subjecting a most useful and respectable class of soldiers to the arbitrary will and pleasure of a commanding officer, and of the great abuses to which this power might give rise. In answer, it was most justly observed, that this power, though termed an innovation, and though in reality not specially recognized by any Article of War till 1747, was in practice coeval with the army, and absolutely essential to its proper discipline; nor could a single example be specified, in which it had ever been abused or improperly exercised. The function of a non-commissioned officer is both conferred and held at the pleasure of his Colonel or commander. It is a rank which the party owes to his merits, and which therefore should be revocable by the same power or authority, on a cessation of the cause for which it was bestowed. In advancing a common soldier to be a corporal, or a corporal to be a serjeant, the Colonel is generally regulated by the advice and recommendation of the captains of the several companies, who must be presumed to have a thorough knowledge of the character and qualifications of each man under their respective commands, being daily witnesses of their performance of duty and behaviour. But both the captains and the Colonel may form mistaken judgments, which nothing but the actual experience of the corporal or serjeant's performance of his new duty can correct: And nothing is more common than that those who have  
for

In general, the sentence of the Court-Martial declares the prisoner guilty or not guilty

for a time behaved well in the prospect of promotion, become afterwards careless, idle, worthless, or retractor. The only check against this change of demeanour in a non-commissioned officer, is the sense that his good conduct is the sole security he possesses for retaining his rank; and that it is in the power of his Colonel to deprive him of it whenever he judges him unworthy. That this punishment will never be inflicted without just cause, he has sufficient security in the regard which a superior officer must ever have for his own reputation and character. To make it necessary in all cases to resort to a Court-Martial, would necessarily occasion such embarrassment and delay, that a commanding officer would often be prompted to wink at improprieties of conduct, and to put up with insufficiency in his non-commissioned officers, rather than follow out the necessary process and formality of trial. Add to this, what all military men must perfectly understand, that the whole of a soldier's conduct and character taken in the aggregate, may be such as to render him a most unfit person for having any command; and yet it may be impossible to specify any positive act to the satisfaction of a Court-Martial, which could justify a formal sentence of degradation. This discretionary power will never be exercised but for cogent reasons; nor will it ever be abused while British officers retain their distinguishing characters of honour and humanity. The army, and indeed the nation at large, owe little obligation to those orators, who, for the purpose of a florid declamation, sacrifice the rights of the subject, and from their deep-felt sense (no doubt) of the hardships suffered by so useful a body of men as the military force of the state, choose in their parliamentary harangues

guilty of the special matters of the charge, and in the event of guilty, awards the proper punishment. But sometimes the degree of criminality actually proved against the prisoner, though of the same nature, may fall short in extent of the crime contained in the charge or accusation; as, for example, the crime charged may be desertion, but the proof may amount to no more than absence without leave. In such case, the court by its judgment ought to acquit from the charge of desertion, but to find the prisoner guilty of the inferior offence, and award a corresponding punishment\*. But though this rule

huanques to represent this class of their fellow-subjects as reduced to a state of servitude and bondage, of which the sufferers themselves are utterly insensible. It argues indeed a lamentable want of information, not to know that the British army is, with respect to the condition of its members and their natural rights as subjects, in a state as superior to that of the army of any other nation in the world, as our constitution is on the whole superior to theirs in the protection it affords, and the franchises it confers on all ranks and conditions of its subjects. But the propagation of such opinions has not, in general, so admissible a plea as ignorance for its apology.

\* On the trial of Serjeant Samuel George Grant, in March 1792, the charge was, *Advising and persuading two drummers*

rule ought to be followed where the offence proved is of the same nature, though less in degree than the crime contained in the charge, it will not hold good where the offence proved against the prisoner is either of a different nature altogether from that which is charged, or of a higher degree of criminality; for the court is not warranted to go beyond the indictment, nor has the prisoner received a fair or a legal notice to prepare his defence against either a different crime, or a higher degree of guilt, than is contained in the charges. If therefore evidence should emerge, in the course of the trial, of greater criminality against the prisoner, or of his guilt of a separate crime, it is

in the Coldstream regiment of Guards to desert his Majesty's service, and enter into the service of the East India Company, knowing them at the time to belong to the said regiment of guards. The court found the prisoner guilty of having promoted and been instrumental towards enlisting of the said drummers, knowing them at the time to belong to the said regiment of foot-guards; which, though a crime rather inferior, was of the same nature with that contained in the charge, and therefore sentenced the prisoner to be reduced to the rank of a private soldier, and to receive a thousand lashes.

competent

competent for the court, after exhausting the actual charges, by their proper sentence, to report their opinion to the commander by whose warrant the court is held, and to recommit the party into confinement, in order that he may be brought to a new trial: or perhaps it may appear a more prudent measure in the court, to suspend its procedure and adjourn; after making report to the person under whose authority it was assembled, of the new matter of guilt that has come to knowledge.

The form of the sentence of the Court-Martial must vary according to the circumstances of the case on which it is pronounced; but a few general observations may here be made, applicable to all sentences whatsoever of general Courts-Martial.

General observations on the Form and Nature of Sentences of Courts-Martial.

As by the tenor of the oath administered to all the members of the court, they are sworn, at no time whatsoever, nor upon any account, to disclose or discover the particular vote or opinion of any par-

ticular member, unless required to give evidence of the same in a court of justice; so it is evidently not proper that the sentence of the Court-Martial should express by what majority of the members it has been pronounced; because that might lead to the discovery of particular votes or opinions; nor although the court be unanimous in its judgment, is it proper to express that circumstance in the sentence; for this in fact is disclosing the votes and opinions of all the members; yet there seems to be no impropriety if there should be an unanimous concurrence of the members for a recommendation to the mercy of the sovereign, that this circumstance should therein be mentioned, as giving the greater weight to the application, and at the same time not leading to any discovery of particular opinions respecting the sentence itself by which the prisoner has been condemned.

The opinions and sentences of the court may be either general in their tenor, that is, declaring the prisoner *guilty* or not *guilty* of

of the articles of charge ; or they may be special, finding certain facts *proved* or not *proved* : in consequence of which they declare him guilty or not guilty on those articles: For, in all cases, the guilt or innocence of the prisoner with respect to the particular charges, must be pointedly found and declared ; otherwise the jurors do not discharge the whole of their duty, which requires, that they should not only decide whether the facts are proved or not proved, but likewise pronounce their judgment on the criminality of those facts.

It was formerly a very usual custom, to express in the sentences of Courts-Martial, the particular Articles of War of which the sentence declared the prisoner to be guilty of a breach or violation ; but the more recent, and the better practice, is to omit all such reference to the Articles of War ; as being in itself unnecessary, and frequently affording handle for cavilling, and sophistical objections of irregularity or incongruity with the articles referred to. If the sentence should be called in  
y 3 question,



question, as not warranted by any positive enactment of the Military law, it is the province of the party who thus arraigns the judgment, to prove his objection by pointing out that incongruity ; for the presumption is, that the decrees and judgments of all courts are warranted by law. •

For a reason much a-kin to the above, it would seem most advisable for Courts-Martial in their opinion and sentences, to avoid all unnecessary minuteness, in detailing or specifying the grounds of those opinions and judgments, and in particular to avoid all argument in justification of their sentences ; for it is unwise in any court to hold forth to the public a challenge to impugn its judgments, or purposely to invite to a discussion of the grounds on which they have proceeded. If a sentence is general, and without the assignment of special reasons, it may be defended by all the good reasons which are applicable to the matter ; but if it assigns its special grounds, it must stand or fall

fall by these alone. It must at the same time be observed, that in cases of a circumstantial nature, and where the sentence of the court is not general upon the whole matters of charge, but special, finding the prisoner guilty of some points of accusation and acquitting him of others; as the punishment to be awarded ought to be in strict proportion to the measure of guilt, so it may be extremely proper, in such cases, to specify in the sentence the particular grounds of the opinion and judgment of the court.

It is not customary in the sentences of Courts-Martial to adjudge or direct the particular mode of the punishment where it is a capital one, nor the time or place of its execution; but only in general terms to adjudge the prisoner to suffer death; leaving to the power by whose authority the sentence is executed, the manner, the time, and the place of its infliction. The appropriate capital punishment of a soldier is to be shot to death; but capital crimes, when attended with peculiar infamy, are ex-

Y 4

piated

piated by the more infamous punishment of hanging by the neck\*.

\* It may not be improper to subjoin to this chapter a short account of the forms observed in the trial of Military offenders, by a *Conseil de Guerre*, or Court-Martial, under the French establishment, previous to the late revolution; a detail, which places in the strongest point of view, the superiority of our criminal procedure in military matters, to that of a nation to whom the art of war has been more the object of systematic arrangement and regulation, than to most of the other nations of Europe.

As soon as any military delinquent was apprehended and committed to prison, the captain to whose company he belonged was required to present a memorial to the governor of the place, setting forth the crime, and demanding that the prisoner should be brought to trial. The governor having granted his permission in writing upon the memorial, transmits it to the major of the garrison, who is to act in the character of prosecutor. The major orders the prisoner to be brought before him strictly guarded, and after reading to him the charges of which he is accused, he demands to hear what he has to urge in his defence, and puts to him whatever interrogatories he thinks proper; taking down his answers in writing, which, after being read over to him, the prisoner must sign. The major then examines, in the prisoner's presence, such witnesses as can best inform of the matters of accusation; the prisoner being at liberty, on just grounds, to object to their competency. The testimonies of the witnesses are then read over to him, and he is asked what he has to urge in answer to their evidence. The substance of his answer is then taken down in writing and signed by him. This procedure, (which generally occupies but a few hours), being finished, the major reports

reports to the governor, who orders a *Conseil de Guerre* to be assembled next morning. The court, which for capital trials must consist of at least seven officers, is composed of as many captains of infantry regiments in garrison, if for the trial of an officer or soldier of foot, and of captains of cavalry, if for an officer or soldier of the cavalry. If there is not a sufficient number of captains, subalterns are allowed to supply their place, and even serjeants. The *Conseil* being assembled in the governor's house, the governor officiates as president of the court, and the major as prosecutor, and the clerk reads over the whole procedure, before the prisoner is brought in. When this first reading is finished, the prisoner is brought before the court, and the whole must again be read over in his hearing. The president then asks if he has any thing further to state in his own defence, and previously thereto, he administers to him an oath, that he shall say nothing but the truth. His answer is written down by the major, and signed by the prisoner. The president then asks him, whether he objects to any of his judges; and if his objection is sustained, the person objected to withdraws from the table. He is in the last place questioned whether he has any accomplices, and his answer is recorded. The prisoner is then sent back into confinement; and the president reads the ordonnance or Military law applying to the case; the major, as prosecutor, demanding a sentence agreeable to the law. A sheet of paper is then given to the youngest member of the court, who writes at the top of it his opinion and vote; folding down the paper upon the writing, and presenting it to the next in order of seniority, till all have written down their opinions; that of the president being counted as two, when on the side of mercy, and as one, when for punishment. The president then opens the paper, and after arranging the votes, declares the opinion of the majority, and pronounces the sentence, which is written down  
by

by the major, and signed by all the members of the court; and immediately thereafter, it is announced to the prisoner, and must be carried into execution the same day; for neither the governor nor any other superior officer has a power of suspending or remitting a sentence once pronounced and signed. The record of the whole proceedings and sentence is sent, on the day following the execution, to the minister of war.

## CHAP. VIII.

### *Of Appeals from a Regimental to a General Court-Martial.*

BY the 7th section of the act for punishing mutiny and desertion, &c. it is enacted, “ That no officer or soldier being acquitted or convicted of any offence, shall be liable to be tried a second time by the same or any other Court-Martial for the same offence, *unless in the case of an appeal from a regimental to a general Court-Martial*; and that no sentence given by any Court-Martial, and signed by the president thereof, shall be liable to be revised more than once.”

By this enactment, it plainly appears that a right of appeal is understood to be competent from the sentences of regimental or garrison courts to general Courts-Martial; and as there is not to be found in any part of the Mutiny-Act or Articles of

Right of  
appeal.

of

of War, any limitation of this right of appeal to particular cases, or any prohibition of it in others, it must be presumed that a right thus recognized in general terms, and which is founded both in justice and expediency, is competent, whatever be the matter or subject of trial, to any party who judges himself aggrieved by the sentence of a regimental or garrison Court-Martial.

How limited.

The only limitation of this right arises from the constitution of all general Courts-Martial. They are not subsisting courts of judicature, open at all times, and to all parties; but being assembled by special warrant for a particular purpose, they are not embodied or created at all, unless it shall appear to the chief military authority, that there is a just and reasonable cause for assembling them. No military person is therefore of absolute right entitled to demand the assembling of a general Court-Martial, either for the trial of himself or another party, unless in one instance, afterwards to be mentioned. His request

request must come by petition or memorial before the Commander in Chief, who will judge from all circumstances, whether the same is reasonable or otherwise, and either grant or refuse it, as he shall think proper. Were this not the case, or were it in the power of every military person to demand of right the assembling of general Courts-Martial for every supposed offence or self-conceived injury or injustice, the army, instead of a well organized, regular, and harmonious body, would be a discordant mass, which the malevolent passions and turbulent tempers of individuals would keep in perpetual agitation.

But as it is competent for the commanding officer or Colonel of any corps to assemble regimental Courts-Martial for the trial of the lesser offences, and for the punishment of non-commissioned officers and soldiers; and as such courts, of which the members are often few in number, and these frequently young and unexperienced officers, must necessarily from these circumstances be more subject to error in  
their



their proceedings and sentences, than a more numerous and select tribunal of experienced men; it would be a material hardship and grievance if those inferior courts were under no control. It is proper, therefore, that they should ever act under a confirmed sense that their proceedings are subject to revision by a general Court-Martial, to whose judicature the party conceiving himself to be aggrieved has it always in his power to appeal, through the medium of the Commander in Chief, who must first determine whether there are just grounds for the review of the sentence.

There is but one particular case in which the Articles of War confer a positive right of demanding trial, in the first place before a regimental court, and afterwards a right of appeal to a general Court-Martial; which is the case of an inferior officer, non-commissioned officer, or soldier, who conceives himself to be wronged by his captain, or other officer commanding the troop or company to which he belongs. It is declared by the 2d article of the 12th section

section of the Articles of War, that such officer or soldier who thinks himself so wronged, " is to complain thereof to the " commanding officer of the regiment, " who is hereby required to summon a " regimental Court-Martial for the doing " justice to the complainant, from which " regimental Court-Martial either party " may, if he thinks himself still aggrieved, " appeal to a General Court-Martial : " But if, upon a second hearing, the ap- " peal shall appear to be vexatious and " groundless, the person so appealing shall " be punished at the discretion of the said " general Court-Martial." It would hence appear, that in all such cases of alleged wrong or injustice committed by superior officers towards their inferior officers or private men, the right of appeal cannot be refused, but must of course be granted, by the Commander in Chief's appointment of a general Court-Martial to take cognizance of the cause ; the only check against rash and ill-founded applications in cases of the above nature, being the strong

strong certification, that an adequate punishment will not fail to attend every unjust or groundless appeal. The reason why a power of appeal is declared to be competent of absolute right to inferior officers or soldiers complaining of being wronged by their superior or commanding officer, is, that a regimental or garrison Court-Martial have not the power of inflicting any punishment on commissioned officers: they can do no more than express their opinion, that the complaint is just, or the contrary, and restore the sufferer against any existing grievance; and the injury complained of, however flagrant, must therefore have remained unredressed, as far as punishment is concerned, if an appeal to a general Court-Martial had not been declared to be a matter of right to the party aggrieved.

Form of procedure in trials of appeal.

The procedure before a general Court-Martial in cases of appeal from a regimental or garrison court, is as follows. The court being constituted by proper authority, the parties in the trial are summoned

to

to attend, together with all the necessary witnesses. The appellant sustains, in conjunction with the Judge-Advocate, the part of prosecutor, and the party in whose favour the inferior court has given its judgment, is defendant in the cause; the charges on the original trial being the matter at issue, on the truth or falsehood of which the court of appeal is to decide. The witnesses examined before the regimental court, are now regularly sworn by the Judge-Advocate, and are entitled, before giving evidence, to have their former testimony or declaration read over to them; and they may either on oath confirm its tenor in all its parts, or dissent or vary from the same, if their conscience so compel them, or add thereto what they may have formerly omitted. They must likewise answer all pertinent interrogatories put either by the prosecutor and appellant or the defendant, or by the court; and that either in the way of primary examination or cross-questioning.

tioning. It is competent, moreover, for either of the parties in the appeal to adduce additional evidence, either by the examination of new witnesses, or the production of writings. The whole of the evidence is taken down in writing by the Judge-Advocate as recorder; and the court deliberates thereon, and pronounces its opinion and sentence, in the same manner as in ordinary trials.

The general regulation of the Articles of War applies to sentences pronounced on appeal, as well as to all others, viz. that no sentence of a general Court-Martial shall be put in execution, till after a report made to his Majesty of the whole proceedings, or to the officer commanding in chief, or some person duly authorised under the Royal sign-manual, to confirm the same.

Revisal of a  
sentence.

The revisal of a sentence by the same court which pronounced it, is not, properly speaking an appeal, which always implies the review by one court of judicature of the sentences of another. It is no  
more

more than a reconsideration of the cause by the same tribunal, on a remittal and recommendation of the commander, who is authorised to approve or to suspend its sentences: a power of high expediency and good policy, and which has often been exercised to the most beneficial ends.\*

\* In October 1798, Patrick Loftus was condemned to death by a general Court-Martial, held in D.ólin barracks, for seducing a soldier of the name of Kennedy to desert from his regiment, and join a party of rebels for the purpose of committing murder. The proof rested principally on the testimony of Kennedy. An officer of respectable rank and character, to whose regiment Kennedy had belonged, solicited the Lord Lieutenant to order a revisal of the sentence; the consequence of which was, a complete proof that Kennedy was an infamous and perjured wretch, who made a profession of giving false evidence, and swearing away the lives of his fellow creatures; and that in this very case he had laid a plot to entrap and destroy the prisoner Loftus, a simple creature, whose greatest offences had been idleness and debauchery. The Court-Martial reversed their own sentence, and were thus relieved from the most dreadful of all reflections, the consciousness of incautiously warranting the shedding of innocent blood.

## CHAP. IX.

*Of Courts of Enquiry.*

Court of En-  
quiry is of the  
nature of a  
Grand Jury.

IN conformity to the practice of the Civil courts of criminal jurisdiction, in which no party can be arraigned before his peers for any crime, until a previous court of inquest shall have declared that there appears sufficient ground for bringing the accused person to trial, (an inquest which, by the law of England, is termed the Grand Jury, and whose place is supplied under the law of Scotland by the function of his Majesty's Advocate), it is understood to be consonant to military law and practice, that in cases of much importance, and where the facts are various and complicated, or there appears ground for suspecting the just foundation of the charges of criminality, or where a crime has been committed, or much blame incurred,

incurred, without any certainty on whom it ought chiefly to attach, a previous Court of Enquiry should take the matters under their consideration, and determine, on such evidence as can be brought before them, whether there is or is not sufficient cause for bringing particular persons to trial for the offence or crime, before a general Court-Martial.

The power of appointing a Court of Enquiry is included in the right of assembling general Courts-Martial; for the latter implying the right of judging whether such a measure may or may not be expedient, of course presupposes the former, as being the best means of regulating that judgment. His Majesty, therefore, or any commander to whom the right of appointing general Courts Martial is committed under the royal sign-manual, is authorised at all times, in order to decide with more maturity of deliberation, whether such Court-Martial should be assembled, to take the opinion of a previous

Who may appoint them.

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Court of Enquiry ;\* and it were greatly to be wished that a measure in itself so wise, and of such obvious utility, were much more frequently resorted to than in practice is done ; or rather that it were a matter of established usage, that no person should be put upon his trial before a general Court-Martial, unless in consequence of a previous report by an inquest, on evidence laid before them, that there appears sufficient ground for calling upon the party to defend himself judicially against the matters of accusation. A preliminary form of this nature would be of

\* Although the power of assembling regular *Courts of Enquiry* seems to be vested only in his Majesty, or in those commanders who have a power of assembling general Courts-Martial, it is a practice not unusual, for the officers of a regiment, on the suspicion of any crime or delinquency being committed by any member of the corps, to hold counsel together on the proper measures to be taken ; and such assembly of the officers, which may be properly termed a *council of enquiry*, is sometimes held under the order of the Colonel or commanding officer of the corps. A meeting of this kind, however, although they may collect material information, from apparent or known facts, or written evidence of which they may be possessed, are not authorised to examine witnesses, or record their declarations.

infinite

infinite service in the repression of calumnious and frivolous prosecutions; and would tend more than any other measure to the checking of that extreme frequency of trials by Court-Martial, which has the worst effect upon the public mind; reflecting dishonour on the military character in general, spreading disunion and party divisions among the members of a corps, and frequently laying the foundation of permanent and even fatal animosities. In many cases, a Court of Enquiry acting as umpires or arbitrators between the parties, might compose differences or explain misunderstandings, so as to prevent the necessity of all further procedure by actual arraignment and trial.

The power of nominating Courts of En-  
 quiry being, as above said, inherently re-  
 sident either in the Crown, or in those  
 officers to whom his Majesty has delegated  
 his authority for calling general Courts-  
 Martial; the opinion of such courts being  
 entirely of the nature of advice or counsel  
 given to his Majesty or his commanders,

Their fu-  
 tion.

has no binding effect as a sentence against the person accused, who in general is no party to their procedure.\* In fact, a court of enquiry is not in every case called upon or warranted even to give an opinion; but is confined solely to the examination of witnesses on certain points, on the results of which examination, the person by whose authority the court of enquiry is held, is to form his own opinion. Yet

\* It has, however, sometimes happened, that the person on whom the blame or criminality was suspected chiefly to attach, has been called upon for examination by a court of enquiry: but this practice is not founded in justice; for it must either tempt the party to give a false account in order to justify his own conduct, or it may lead him to charge himself with criminality, which no person can be compelled, or even ought to feel himself induced, to do. Thus, in the court of enquiry, appointed in November 1757, for investigating the causes of the failure of a military expedition to the coast of France; Sir John Mordaunt, the commander of the expedition, being himself examined, pleaded afterwards with justice, when brought to trial by a general Court-Martial, against the hardship of having been himself obliged to furnish evidence on matters on which he was afterwards to be arraigned as a criminal. There seems therefore to be a gross impropriety in any court of enquiry calling before them for examination any person on whom it is supposed the guilt or blame is to attach,

although

although the report of a Court of Enquiry has in no case the positive effect of a sentence, it may in some cases be immediately followed by the punishment of the party whose conduct has been the object of the enquiry. It is well observed by a judicious writer,\* that “as it is the prerogative of the Crown, to dismiss officers or soldiers, or any other servants, from its service, without any form of trial; so far from objecting to the power of appointing courts of enquiry being lodged with the King, whenever his Majesty shall condescend to leave the examination of doubtful cases to such a court, and take their opinion thereon, previous to the dismissal of the suspected person or persons, or the bringing of them before a Court-Martial, where an offender risks being punished with more severity; it may be regarded rather as a mark of his clemency, and a certain indication of his love of justice and equity.” So

\* Adye on Courts-Martial.

likewise,

likewise, although no commander in chief having authority to summon Courts-Martial, has any power of inflicting a proper penal sentence, unless through the medium of a Court-Martial; yet in the case of an officer holding any particular employment or command under the appointment and at the discretion of the commander in chief, there can be no doubt, that, on the report of a Court of Enquiry, warranted to examine and to give an opinion upon his conduct, he might, without further procedure, be instantly removed or superseded in such command or employment, by the same power which conferred it. In general, however, the report of a Court of Enquiry has no direct effect upon the party accused, but is subservient only to the forming of a just determination, whether there is or is not sufficient cause for the assembling of a general Court-Martial for taking trial of the matters of accusation.

As by the common law, no indictor or juror who has found a true bill against a person accused, can afterwards be put upon

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of En-  
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t-Martial.

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on the petty jury for the trial of that person ; so, on the same equitable principle, it must be a sufficient challenge against the member of a Court-Martial, that he had formerly been of a Court of Enquiry, for examining into the conduct of the party to be tried. It is no good answer to say, that the members of a Court of Enquiry do not in reality decide upon the guilt or innocence of any party, but report only that there is matter for a judicial enquiry, and thus they cannot be said to prejudge the cause\*. It is a sufficient objection to their admissibility as jurors, that they do not come to try the issue with a free and unprejudiced mind ; but, on the contrary, must involuntarily feel themselves under the bias of supporting a preconceived opinion.

The members of a Court of Enquiry are not sworn as those of a Court-Martial ; nor do the witnesses examined give their evidence upon oath ; neither can any per-

\* An argument used by Mr. Williamson in his *Elements of Military Arrangement*, vol. 2. p. 112.

son be legally obliged to furnish information or give his testimony before a Court of Enquiry. It is, however, a subject worthy of consideration, whether it were not better that this tribunal, in order that it might possess all the power, and furnish all the benefits of a Grand Jury, should be constituted under the like bond of a solemn oath, and have power of compelling the attendance of witnesses, and receiving their testimony likewise upon oath\*.

\* See in the Appendix, No. 5, the Form of the Appointment of a Court of Enquiry by his late Majesty George II,

CHAP. X.

*Of the Office and Duties of a Judge-Advocate. •*

FOR sustaining the interest of the Crown in trials before a general Court-Martial, an officer is appointed, under the title of Judge-Advocate, to prosecute in the name of the Sovereign; for as, in all criminal trials, the Sovereign, whose laws are violated, is understood to be the party injured, and who is entitled to demand redress, by the punishment of the guilty person, which function in the ordinary courts of law is discharged by his Attorney-General; so in offences against the Military Law, which are not cognizable by the ordinary tribunals, but are declared to be specially so by Court-Martial, the Judge-Advocate is appointed to fulfil a similar

Judge-Advocate prosecutes in name of the Sovereign.



milar duty, and to prosecute in his Majesty's name, all officers and soldiers, *commissioned or in pay*, who shall be guilty of any breach of the Military Law, either as contained in the Articles of War, the Mutiny-act, or other regulations issued for the government of the army.

His functions  
are various.

The appropriate functions of the Judge-Advocate, as an essential officer in all general Courts-Martial, are various in their nature; and as neither the Mutiny-act nor Articles of War describe them with much precision, we are thence obliged, in supplement of what is found in those direct authorities, to resort to the less positive, though equally binding authority of established usage and practice.

Duty in in-  
ning the  
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The rubric or marginal notice of the 6th article of the 16th section of the Articles of War bears, "that the Judge-Advocate is to *inform* and *prosecute*;" but in the body of the article itself, there is nothing said with respect to the first of these duties, the only matter expressly enacted being, that he shall prosecute in  
the

the name of the Sovereign, and administer to the members of the court the oath as therein prescribed\*. Hence it might perhaps be argued, that the word *inform*, used in the margin, did not imply a separate duty from that of prosecuting; but was used here as synonymous with the words

\* This Article of War is altogether conceived in very loose and inaccurate terms. It bears, that "the Judge-Advocate General, or some person deputed by him, shall prosecute in our name, and, in all trials of offenders by general Courts-Martial, administer to each member the oaths, &c." By this enactment, the power of prosecuting in Courts-Martial is limited to "the Judge-Advocate General, or some person deputed by him;" although in reality it is customary for his Majesty to appoint Judge-Advocates, by special commission, under his own sign-manual, to officiate over a certain department of his dominions; which persons fall neither under the description in the Article of War, of "Judge-Advocate General, nor persons deputed by him." Thus, the Judge-Advocate for North Britain, if the Article of War is to be strictly interpreted, would have no title to prosecute in his Majesty's name in trials held in that country, although his commission under the royal sign-manual expressly gives him that power; a commission which, it is to be observed, is inaccurately conceived in its own terms, in as much as it styles that officer *deputy Judge-Advocate*, who does not hold his commission by deputation, but by direct and primary appointment of his Majesty, and who has a power of delegation, or appointing his own deputies, by commission from himself.

*accuse*

*accuse* or *indict*, and, as so taken, was included in the duty of prosecuting. Established usage must, here, however, be called in, to clear up an ambiguity of expression; and, on that authority, we are warranted to say, that the sense annexed here to the word *inform*, implies a distinct duty of the Judge-Advocate, viz. that of instructing or counselling the court, not only in matters of essential and necessary form; with which he must be presumed to be from practice most thoroughly acquainted; but in explaining to them such points of law as may occur in the course of their proceedings, and with respect to which the Articles of War or Mutiny-act may be silent. For it is to be observed, that in all matters touching the trial of crimes by Courts-Martial, wherever the Military law is silent, the rules of the common law of the land, to the benefit of which all British subjects are entitled for the protection of life and liberty, must of necessity be resorted to; and every material deviation from these rules, unless warranted by

by some express enactment of the Military code, is, in fact, a punishable offence in the members of a Court-Martial, who may be indicted for the same in the King's ordinary courts. Hence arises the absolute necessity for some member of the court being versant in the general doctrines of the law, in as far as they relate to the trial of crimes and the weighing of evidence: And the person to whom the court is naturally to look for information of this kind, is the Judge-Advocate, who is either by profession a lawyer, or whose duty, if he is not professionally such, is to instruct himself in the common law and practice of the ordinary courts in the trial of crimes.

In the performance of this duty, the Judge-Advocate will always be guided by a just sense of his official character and situation. As he has no judicial power, nor any determinative voice, either in the sentences or interlocutory opinions of the court, so he is not entitled to regulate or dictate those sentences or opinions, or in

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any shape to interfere in the proceedings of the court, further than by the giving of counsel or advice; and his own discretion must be his sole director in suggesting when that may be seasonable, proper, or necessary. On every occasion when the court demands his opinion, he is bound to give it with freedom and amplitude; and even when not requested to deliver his sentiments, his duty requires that he should put the court upon their guard against every deviation, either from any essential or necessary forms in their proceedings, or a violation of material justice in their final sentence and judgment. A remonstrance of this nature, urged with due temperance and respect, will seldom, it is to be presumed, fail to meet with its proper regard from the court; but should it happen that an illegal measure or an unjust opinion is nevertheless persevered in, the Judge-Advocate, though not warranted to enter his dissent in the form of a protest upon the record of the proceedings, (for that implies a judicative voice), ought to

to engross therein the opinion delivered by him upon the controverted point, in order not only that he may stand absolved from all imputation of failure in his duty of giving counsel, but that the error or wrong may be fairly brought under the consideration of that power with whom it lies, in the last resort, either to approve and order into effect, or to remit the operation of the sentence. ••

Another part of the official duty of the Judge-Advocate, which, though not enjoined by any particular enactment of the Military Law, has yet the sanction of general and established practice, is, that he should assist the prisoner in the conduct of his defence. This duty is more especially incumbent on the Judge-Advocate in cases where the prisoner has not the aid of professional counsel to direct him, ~~which~~ generally happens in the trials of private soldiers, who, wanting all advantages of education, or opportunities of mental improvement, must stand greatly in need of advice in such trying circumstances as are

His duty in assisting the prisoner in his defence.

sufficient often to overwhelm the acutest intellect, and embarrass or suspend the powers of the 'most cultivated understanding. It is certainly not to be understood, that in discharging this office, which is prescribed solely by justice and humanity, the Judge-Advocate should, in the strictest sense, consider himself as bound to the duty of a counsel in exerting his ingenuity to defend the 'prisoner, at all hazards, against those charges which, in his capacity of prosecutor, he is, on the other hand, bound to urge, and to sustain by proof; for, understood to this extent, the one duty is utterly inconsistent and incompatible with the other. All that is required is, that, in the same manner as in the Civil courts of criminal jurisdiction, the judges are understood to be of counsel with the person accused; the Judge-Advocate, in Courts-Martial, shall do justice to the cause of the prisoner, by giving its full weight to every circumstance or argument in his favour; shall bring the same fairly and completely into the view of the court; shall

shall suggest the supplying of all omissions in the leading of exculpatory evidence; shall engross in the written proceedings all matters, either directly or by presumption, tending to the prisoner's defence; and finally, shall not avail himself of any advantage which his superior knowledge or ability, or his influence with the court, may give him, in enforcing the conviction, rather than the acquittal, of the person accused.

Many of the official functions of the Judge-Advocate, in the trial before a general Court-Martial, and in the matters preparatory and relative thereto, have been occasionally mentioned in the preceding chapters; but, for the sake of greater perspicuity, they shall be here recapitulated in a regular detail, in which may likewise be noticed such other particulars of the duty of this officer as have not hitherto occurred to observation.

When a Court-Martial is summoned, by the proper authority for the trial of any military offender, the Judge-Advocate be-

He must range all the preparatory to the trial.



ing required to attend his duty, and furnished with the articles of accusation or charge on which he is to prosecute, must, from the information of the accuser, instruct himself in all the circumstances of the case, and by what evidence the whole particulars are to be proved against the prisoner. Of these it is proper that he should prepare in writing, a short analysis, or plan, for his own regulation in the conduct of the trial, and examination of the witnesses. He ought then to give the earliest intimation to the prisoner of the time and place appointed for his trial, and furnish him at the same time with a true copy of the charges that are to be exhibited against him, with the names and designations of the witnesses by which they are to be proved or supported ; and likewise a correct detail of the members of the Court-Martial. He should at the same time require from the prisoner a list of those witnesses whom he intends to adduce in his exculpation, that the privilege may be mutual to both parties, of object-

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ing to such evidence as they may judge either inadmissible or of suspected credibility. The Judge-Advocate ought then to summon the witnesses for the prosecution to give their attendance at the time and place appointed; and this either by a direct intimation from himself to each of those witnesses, or by an application to the commanding officers of the regiments or parties to which they belong, requesting that they may be warned to attend that duty. It is proper, likewise, that he should desire the prisoner to make a similar application, to enforce the attendance of the witnesses necessary for his defence. These measures ought to be taken as early as possible, that there may be sufficient time for the arrival of witnesses who may be at a distance\*.

It seems in no case to be improper, and may often tend to material justice, as well as to the shortening of judicial proceedings, that the Judge-Advocate, on whom

\* As to the indemnification of witnesses for their travelling and necessary charges, see *supra*, p. 305.

lies the conduct of the evidence for the prosecution, and the discretionary power of examining such witnesses only as he may deem necessary, should previously be acquainted with the general nature and scope of the prisoner's defences; and for that purpose, that he should either converse with himself, or with his counsel, before proceeding to trial. It has sometimes happened, that by a timely explanation in such previous conference, circumstances of the charge, apparently the most unfavourable, have been alleviated or done away, and even the necessity of a trial altogether superseded, by the anticipation which such conference afforded, of a judgment of acquittal from the chief matters of accusation.

is duty as  
Recorder of  
the Court.

When the court is met for trial, and the members are regularly sworn, the Judge-Advocate, after opening the prosecution by a recital of the charges, together with such detail of circumstances (if the case is circumstantial and complicated) as he may deem necessary, proceeds to examine his witnesses

witnesses in support of the charges; while at the same time he acts as the recorder or clerk-register of the court, in taking down the evidence in writing at full length, and as nearly as possible in the words of the witnesses. (See *supra*, ch. 4, sect. 5.)

At the close of the business of each day, and in the interval before the next meeting of the court, it is the duty of the Judge-Advocate to make a fair copy of the proceedings; which he continues thus regularly to engross, to the conclusion of the trial, when the whole is read over by him to the court, before the members proceed to deliberate and form their opinions.

Of his duty in collecting the opinions and votes of the members upon the several articles of the charge, after they have fully deliberated on the same, and lastly, in recording the final sentence of the court, we have fully treated in the preceding chapter vii.

The sentence of the court must be fairly engrossed, and subjoined to the record-copy of the proceedings; and the whole  
must

must be authenticated, by the subscription of the President of the court and that of the Judge-Advocate.

It is required by the Mutiny-act, § 16. "That every Judge-Advocate, or person officiating as such at any general Court-Martial, shall transmit, with as much expedition as the opportunity of time and distance of place can admit, the original proceedings and sentence of such Court-Martial, to the Judge-Advocate General in London, which original proceedings and sentence shall be carefully preserved in the office of the said Judge-Advocate General, to the end that all persons entitled thereto may be enabled, on application to the said office, to obtain copies thereof." And by the preceding section 15. it is enacted, That the party tried by any general Court-Martial within Europe, (except in the garrison of Gibraltar), shall be entitled to a copy of the sentence and proceedings of the said court, on demand made, by himself, or by any person on his behalf, (they paying reasonably for the same),

same), at any time, not sooner than three months, after such sentence; and in the case of trials at Gibraltar, not sooner than six months after the said sentence; or twelve months, if the Court-Martial has been held in foreign parts, or in his Majesty's dominions beyond seas.

It is proper that the Judge-Advocate, or the person officiating as such, should retain in his own possession, and carefully preserve, the original minutes of the proceedings drawn up by him in court during the course of the trial, that in case of any after-questions that may be moved in the ordinary courts of law or in parliament, touching the conduct or result of the trial, the Judge-Advocate may have recourse to them as necessary documents, if he should be called upon to give evidence in relation thereto.

## CHAP. XI.

*Conclusion of this Treatise—Of the Extension of Martial Law in times of Danger to the State. .*

Three consequences of the preceding doctrines.

FROM the general scope of the doctrines maintained in the preceding Essay, three propositions may be fairly deduced .

1st, That the Military law which obtains in these kingdoms, rests on the same basis of legality with the common and statute laws of the land.

2d, That the Military law is a wise, equitable, and humane system, attuned to the spirit of our free constitution, authorizing only such restraints as are absolutely necessary for the regulation and discipline of the army, on which depends the maintenance of the national security, and, by necessary consequence, the

the enjoyment of all our civil rights and franchises.

3d, That, under the British constitution, the Military law does in no respect either supersede or interfere with the Civil law of the realm: that the former is in general subordinate to the latter: but as, in every well regulated government, all the parts should harmonize and mutually assist the operation of each other; so, by our constitution, the Military law gives its aid in many cases to the execution of the Civil; as the Civil, in its turn, supplies the deficiencies of the Military, and assists, wherever it is necessary, its operation.\*

This perfect harmony between the civil and the military powers of the state, depends on each having its peculiar province clearly and accurately defined; and the particular cases being distinctly specified, in which the one power is called upon to co-operate with the other, there can be no

\* See *supra*, p. 155.—160.



encroachment which shall not immediately be perceived, and of course meet with its due correction.

Such is the regular tenor of the operations of the civil and military law, in times when the state enjoys its ordinary tranquillity. But there are extraordinary seasons, when the body-politic, like the natural, is affected by disease, and when absolute necessity authorises the application of extraordinary remedies. In ordinary times, the personal liberty of individuals cannot be abridged at the mere discretion of any magistrate, nor without the production of the prisoner in court, a certification of the cause of his detainer, and a decree of the judge declaring it to be legal. But in times of turbulence and danger, these securities of personal liberty must yield to the greater object, the security of the state; and the legislature authorises for a time a suspension of the statute of *Habeas Corpus*. So likewise the common and statutory law, which, in ordinary times, is adequate to the coercion of

of

of all offences, may be found, in times of extraordinary turbulence and alarm, utterly inadequate to the repression of the most dangerous crimes against the state. The slow and cautious procedure of the King's ordinary courts of justice, keeps no pace with that daring celerity which attends the operations of rebellion; nor are their regulated forms and publicity of procedure fitted to bring to light the dark designs of a conspiracy. In such seasons, therefore, the constitution possesses in itself that remedy which is necessary for its own preservation. By the *Declaration of Rights*, that important deed by which the liberties of the subject were ascertained and settled at the Revolution, the power of dispensing with the laws, or suspending their execution, which in former times was exercised by the Sovereign, is declared to be illegal, if *without the consent of parliament*. Its legality, therefore, *with the consent of parliament*, is of consequence plainly recognized: and as, when emergency requires

quires, the *Habeas corpus act* is for a time suspended; by the joint will of the King and the two houses of parliament; so, by the same authority, in times of actual rebellion, Martial law, and the mode of summary trial by Courts-Martial, is enacted for a limited time, either over a part or the whole of the kingdom where such rebellion may exist.

The form of  
enactment of  
Martial Law

The statute for the enactment of Martial Law, ordinarily proceeds on a narrative of its inductive causes, in order that the subjects in general may be certified of the necessity of this strong measure; and that, while the full extent of its object is perceived, no unnecessary alarm may be excited in the minds of the innocent and well-affected part of the community. The right of the Legislature to adopt this violent but necessary remedy, and to invest the Crown with this extraordinary power of the sword, is likewise pointedly asserted on constitutional principles, that all may perceive its entire legality. It is then declared, that

that it shall be lawful for his Majesty, or for any chief governor or commander whom he shall appoint, during the continuance of the rebellion, and that whether the ordinary courts of justice shall or shall not be open, to issue his or their orders to all officers commanding his Majesty's forces, and to all others whom he or they shall think fit to authorise, to take the most vigorous and effectual measures for suppressing the said rebellion, in any part of the kingdom, which shall appear to be necessary for the public safety, and for the safety and protection of the persons and properties of his Majesty's peaceable and loyal subjects; and to punish all persons, acting, aiding, or assisting in such rebellion, either by death or otherwise, as to them shall seem expedient. The statute likewise ordinarily gives a power to arrest or detain in custody all suspected persons, and to cause them to be brought to trial in a summary manner by Courts-Martial, and to execute the sentences of all such

courts, whether of death or otherwise. It declares, moreover, that no act done in consequence of these powers shall be questioned in any of the King's ordinary courts of law; and that all who act under the authority of such statute shall be responsible for their conduct in the same only to such Courts-Martial.\*

Such is that most energetic, but formidable remedy which resides in the British Constitution, for the correction of those disorders which bid defiance to the ordinary vigour of the laws; a remedy warranted only by the last necessity, and therefore to be commensurate in the endurance of its operation to the immediate season of danger. But the power of calling forth this extraordinary antidote against those evils which would otherwise destroy the state is in itself one of the greatest blessings which we owe to our free government. Of such temporary

\* See Appendix, No. VI. .

restraint on the natural liberty of the subject none will ever complain, but those on whom that restraint is necessary. The good man and the worthy citizen feels no hardship in that law, which holds out its terrors only to the enemies of his country. Even the philosopher and speculative politician will subscribe to the wisdom of that expedient, which requires us *to part with our liberty for a while, in order that we may preserve it for ever.*



## APPENDIX.

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No. I.

### *Of the Ancient Assize of Arms, and Commission of Array.*

BY the Assize of Arms, as settled in the reign of Henry II, *A. D.* 1181, " Every person possessed of a Knight's fee was to have a coat of mail, an helmet, a shield, and a lance, and as many of these as he had fees. Every free layman that had in goods or rents to the value of 16 marks, was to have the same arms; and such as had 10 marks were to have a lesser coat of mail, an iron cap, and a lance; the two last of which, with a *wambois*, (*i. e.* a coat quilted or studded with some material proper to resist the stroke of a weapon,) were assigned for the arms of burgesses, and all the freemen of boroughs. These arms were all to be provided before the feast of St. Hilary

B B 3



" lary next following. ~~None~~ obliged to have  
 " them, could either sell, pawn, lend, or part  
 " with them out of his custody; nor could  
 " a Lord take them from his vassal, either by  
 " forfeiture, gift, security, or in any other  
 " manner: When the possessor died, they de-  
 " scended to his heir; and if this heir was a  
 " minor, his guardian was to have the custody  
 " of his arms, as well as body; and till the heir  
 " came of age, he was to find a man to use them  
 " in the King's service." The itinerant justices  
 " were charged with the care of the execution  
 " of this ordinance, and had a power as well of  
 " examining all persons upon oath, as to the  
 " value of their estate, as of obliging them to  
 " swear that they would be faithful to the King,  
 " and keep these arms for his service, and the  
 " defence of the kingdom. No man was to  
 " keep more arms than he ought by this assize;  
 " nor were any to be sold or carried out of the  
 " realm. This last prohibition likewise extended  
 " to ships and timber." *Benedict*, p. 365.

Henry II. established a similar regulation in  
 his foreign dominions, which comprehended a  
 large portion of France, viz. Guienne, Poitou,  
 Saintonge, Auvergne, the Limousin, Perigord,  
 Angoumois, Anjou, Maine, Touraine, Nor-  
 mandy, and Britany; and his cotemporary

Philip

Philip Augustus was so sensible of the wisdom of those institutions, (or as Carte plausibly supposes, so alarmed at them,) that he immediately established the same in his own kingdom.

At the distance of a century, a new Assize of Arms was enacted by the statute of Winchester, passed 13th Edward I. A. D. 1285, settling the number and quality of the weapons of offence and defence, with which each person, according to the value of his estate or property, was bound to provide himself. It was likewise ordained, "That view of armour be made every year two times; and in every hundred and franchise, two constables shall be chosen to make the view of armour; and the constables aforesaid shall present before justices assigned, such defaults as they do see in the country about armour; and the justices assigned shall present at every parliament, unto the King, such defaults as they shall find, and the King shall provide remedy therein."

These statutory enactments, for the security and defence of the kingdom, superseded the necessity of a standing army, and were free from some of its inconveniences. To enforce the observance of these regulations in time of peace, the above mentioned proviso, of an inspection at stated times by the constables, was

deemed sufficient; but something more was requisite when the kingdom was either actually engaged in war, or in the apprehension of imminent danger. At such seasons, therefore, it was customary for the King to issue commissions to experienced officers, to draw out and array the fittest men for service in each county, and to march them to the sea-coasts, or to such other quarters of the country as were judged to be most in danger. Of these *Commissions of Array* there are many hundreds in the Gascon and French rolls in the Tower of London, from the 36th of Henry III. to the end of the reign of Edward IV. They became however less customary, as foreign wars became less frequent; and in the reigns of Henry VIII. and Elizabeth, it was thought more expedient to establish Lords-Lieutenants and deputies in the several counties as standing officers, for assembling and mustering the military force in case of danger or alarm from the enemy.

The statutes of Armour were repealed by 2d Jac. I. c. 25. and 21st Jac. I. c. 28. The form of the ancient *Commissions of Array* may be seen in Rushworth's *Historical Collections*, *sub. an.* 1640; when they were attempted to be revived by Charles I. in consequence of a bold invasion of the prerogative of the Crown by the Parliament,

Parliament, in naming their own commissioners for levying and mustering troops in various parts of the kingdom. The commissions granted by King Charles, though drawn up in the very words of that which had been issued in the reign of Henry IV. were voted illegal and unconstitutional by that Parliament, which had immediately before arrogated to itself the command of the militia, and was thus proceeding in its regular plan of overthrowing the constitution, by assailing, in its turn, every legal prerogative of the Sovereign, 'previous' to the utter abolition of his function and dignity.

## No. II.

*Of the Offices of High Constable and Marshal,  
and of the Powers of the Court of Chivalry.*

THE Constable and Marshal were officers of eminent importance and dignity in all the feudal governments of Europe. The title of Constable, or *Comes Stabuli*, explains the original nature of this office, which was that of commander of the cavalry; and as these were the principal strength of the Imperial or Royal armies, this officer

officer became naturally the Commander in Chief of those armies. The office of Marshal appears originally to have been of a much inferior nature, the person who exercised it being the actual superintendant of the stables or chief of the equerries, whose duty was to furnish the provender for the horses, and to oversee their proper management. But in process of time this office grew into high consideration, and the Marshal, subordinate only to the Constable, became the second in command of the armies, and in the absence of the latter, supplied his place.

In England the offices of the High Constable and Marshal were not only *ministerial* in the actual command and regulation of the army, but *judicial*, as possessing, by delegation from the Sovereign, the right of deciding in all matters touching war, both within and without the kingdom,\* a power which, probably from the looseness

\* "In England, the High Constable is an officer of great honour and authority, appointed and ordayned in the beginning for the assistance of the King in martiall assayres, and came into this realm out of France, as is most likely, and to them out of the empire." *Discourse by Mr. Leigh in Hearne's Discourses by eminent Antiquaries.*

"Cognoscunt Counestabilis et Marescallus in curia militari,  
" de

looseness of the terms in which it was conferred, these officers gradually extended to a most formidable

" de criminibus perpetratis extra regnum Angliæ, de contractibus factis apud externos, et de rebus quæ ad bellum et arma spectant, sive in regno Angliæ, sive apud externos "

*Duc. de autoritate, Jur. Civ.*

" To determine the sutes in camp, the Constable and Marshall do hold a court. By Gervasius Tilburiensis the Mareshall and Constable doe take account, of all the sumpendary souldiers, giving them allowance or discharge. They make certificates, whether the knights have served, according to tenure, their fees &c. &c. See Rob Cotton's Discourse in Hearn's Discourse in Ancient Antiquaries

In a Discourse by Mr. Agard (1602) on the antiquity and office of the Marshal of England, the powers of the Constable and Marshal are pretty fully enumerated. " For warres the Marshal is next to the High Steward and Constable, the chief officer having charge of all things that may tend either to the benefit or surety of the army where he keepeth a Martial Court of pleading, as I have seen in these words. *Placita exercitus regis apud Wark, 6 anno regni R. I 24to*, which court was kept in the presence of the Stewart, Constable, and Marshal, as I gather by the pleading before whom were pleaded trespasses and lurs done by one souldier to another. *Item*, It appeareth that it was not lawful for any souldier to arrest another, but by the Marshall, else punishable. *Item*, He punished all victuallers that sold, regrated, or forestalled victuals. *Item*, He punished all those that failed in watching and wading. *Item*, He made proclamations in the King's name, that none should break arraye, or march before the King's stand and or other standards, but by the direction of the Constable and

midable usurpation on the department of the common law, and the jurisdiction of the ordinary civil courts of the realm. To such extent had this grievance arrived, that in the reign of Richard II. it was necessary to correct it by a particular statute, 13th R. II. c. 2. which, while it puts an end to the usurped authority of the High Constable and Marshal, distinctly ascertains the extent of their lawful jurisdiction.

“ *Item, Because the Commons do make a grievous complaint that the Court of the Constable and the Marshal hath incroached to him, and daily doth incroach contracts, convenants, trespasses, debts and detinues, and many other actions pleadable at the common law, in great prejudice of the King and of his courts, and to the great grievance and oppression of the people; Our Lord the King, willing to ordain a remedy against the prejudices and grievances aforesaid, hath declared in this parliament, by the advice and assent of the Lords Spiritual and Temporal, the power and jurisdiction of the said Constable, in the form that followeth: To the constable it pertaineth to have cognizance of contracts touching deeds of arms and of war out of the realm,*

“ *and Marshal; and inflicted by the said proclamation punishment or death.*”

“ and

“ and also of things that touch was within the  
 “ realm, which cannot be determined nor discus-  
 “ sed by the common law, with other usages,  
 “ and customs to the same matters pertaining,  
 “ which other Constables heretofore have duly  
 “ and reasonably used in their time; joining to  
 “ the same, that every plaintiff shall declare  
 “ plainly his matter in his petition, before that  
 “ any man be sent for to answer thereunto. And  
 “ if any will complain, that any plea be com-  
 “ menced before the Constable and Marshal  
 “ that might be tried by the common law of the  
 “ land, the same plaintiff shall have a privy seal  
 “ of the King without difficulty, directed to  
 “ the said Constable and Marshal, to sur-  
 “ cease in that plea, until it be discussed by the  
 “ King’s council, if that matter ought of right  
 “ to pertain to that court, or otherwise to be  
 “ tried by the common law of the realm of  
 “ England, and also that they surcease in the  
 “ mean time.”

A commission for the office of High Con-  
 stable of England, granted above a century after  
 this period, viz. in the 7th year of Edward IV.  
 to the Earl of Rivers, is of importance in show-  
 ing the very extensive powers of this office,  
 even after the above restrictory statute. It  
 contains the following clauses.

“ Rex,



“ Rex, &c. De gratia nostra speciali, concessimus eidem Comiti de Ryvers dict. officium Constabularii, Angliæ, habendum, occupandum, &c. per se, vel sufficientes deputatos suos,—pro termino vitæ suæ, in omni et singulis quæ ad idem officium pertinerent.—Et ulterius—plenam potestatem et auctoritatem damus et concedimus, ad cognoscendum et procedendum in omnibus et singulis causis et negotiis de et super crimine læsæ majestatis, seu ipsius occasione, cæterisque causis quibuscunque—quæ in curia Constabularii Angliæ ab antiquo, viz. tempore dicti Domini Gulielmi Conquestoris, progenitoris nostri, seu aliquo tempore citra, tractari, audiri, examinari, et decidi consueverunt, aut de jure debuerunt seu debent, causasque et negotia prædicta, cum omnibus et singulis emergentibus, incidentibus, et connexis, audiendum, examinandum, et fine debito terminandum, etiam summarie et de plano, sine strepitu et figura judicii, solâ facti veritate inspectâ, ac etiam manu regia, si opportunum visum fuerit eidem Comiti de R. vices nostras\*, appellatione remotâ.

\* *Supplendo,*  
 or some such  
 word, i. proba-  
 bly wanting  
 here.

“ Ex mero motu et scientiâ prædictâ nostrâ, similiter committimus plenariam potestatem cum cujuslibet pœnæ et mulctæ, et alterius  
 “ coercicionis

“cohercionis legitimæ executionisque rerum,  
 “quæ in hac parte decreverit facultatem, cæ-  
 “teraque omnia quæ ad officium Constabularii  
 “Angliæ pertinent faciendum, aliquibus sta-  
 “tutis, actibus, &c. aut aliâ aliquâ re, &c. non  
 “obstante,” &c. *Spelman. Gloss. voce Constabularius.*

From this very curious document, the following remarkable particulars occur to our observation.

1. An office of the highest criminal jurisdiction, in a great variety of offences, of which the nature is no otherwise defined than by use and custom, (which had led, as we have seen, to the most illegal encroachments and violation of the laws of the realm,) is conferred upon a single individual, for life, and even with a power of exercising it by deputies. 2. This jurisdiction is declared to be free from, and unfettered by all the usual forms of judicial procedure in the trial of crimes. There is not even to be the appearance of a trial (*sine strepitu et figurâ judicii.*) The judge, after enquiring simply into the truth of the fact, (*sola facti veritate inspectâ,*) that is, satisfying himself of its truth, in any manner he shall think fit, may instantly, and upon the spot, (*summariè et de plano,*) decide the case, and award any punishment that  
 to

to him may seem proper, (*cujuslibet pænæ et mulctæ, et alterius coercionis legitimæ facultatem, &c.*) 3. This judge may make use of the *King's name* to carry his sentences into execution; and no appeal to the King is competent against his decrees.

In perusing this most extraordinary commission, we are naturally led to exclaim, What was the constitution of England at this time? What bounds had the prerogative of the Sovereign, or what protection did the laws afford to the subject? The answer is obvious: The state of the kingdom at this time, torn by the contending factions of York and Lancaster, precludes all reasoning from this fact, as to the constitutional powers of the Crown. We cannot judge of the constitution of England from the administration of a government perpetually shifting from one rival family to another, established by the prosperous issue of one day's combat, and lost by a similar chance the next. As the sword gave the crown, so it was maintained by the sword; and the Prince felt for the time no limits to his authority, while he commanded a victorious army. As all resistance was necessarily treason, whoever escaped from the field, was doomed to fall upon the scaffold; but the ordinary course of justice was not an engine sufficiently quick,  
nor

nor even altogether certain in its operation ; and the Sovereign, by an ample commission to his High Constable, to decide *summarie et de plano*, in all treasons, and in every thing that had but an affinity to that crime of most extensive construction, took that method which he might conceive the emergency justified, and to which the precarious tenure of his own power necessarily prompted him. That such exertion of authority was unjustifiable upon any constitutional principle, there needs no argument to prove.

We must therefore look back to the statute, 13th Ric. II. c. 2. as fixing the real and constitutional powers of the Constable, and limiting his jurisdiction to “ contracts touching deeds of arms and of war out of the realm, and all things that touch war within the realm, and which cannot be determined by the common law :” And hence we must conclude, that he was the judge to whose sole cognizance belonged all military offences, and to whom was exclusively committed the enforcement of the Martial law of the kingdom : an officer, in short, discharging that extensive duty, which, in modern times, belongs to the Sovereign of England, as head of the army, and of which

he exercises the judicial part through the medium of his Courts-Martial.

But what we have hitherto said touches only the judicial powers of the Constable, or what Spelman terms his *munus forense*: his powers as a field-officer (*munus castrense*) were equally ample and dignified. The Constable was subordinate only to the King in the command of the army; and even when the King was actually in the field, the efficient command of the troops seems to have been in this officer, and all general orders were issued jointly in the Sovereign's name and in the Constable's.

Immediately subordinate to him, was the Marshal, who, while the Constable was present, exercised no authority, unless by his command; but, in his absence, fulfilled all his functions. Both the military and the judicial powers of the Constable appear to have been delegated to the Marshal; for the restrictory statute\* of Richard

## II

\* In some cases, the certificate of the Marshal was equal to a trial by law. "Where the King," says L. C. Coke, "maketh a voyage royal into Scotland, and the escuage is assessed by Parliament, if the lord distraine his tenant that holdeth of him by the service of a whole knight's fee for the escuage so assessed, and the tenant pleadeth, and will avow, that he was with the King in Scotland by forty days,

II. applies equally to both these officers. And Sir Edward Coke, in the following passage, declares both the joint jurisdiction of these officers, and the mode of proof of which they gave their sentences :

“ If a subject of the King be killed by another  
 “ of his subjects in any foreign country, the  
 “ wife, or he that is heire of the dead, may have  
 “ an appeal for this murder or homicide before  
 “ the Constable and the Marshall, whose sen-  
 “ tence is upon *testimony of witnesses*. or, *com-*  
 “ *bat*; and, accordingly, where a subject of the  
 “ King was slaine in Scotland by others of the  
 “ King’s subjects, the wife of the dead had her  
 “ appeal therefore before the Constable and the  
 “ Marshall.” Sir Edward Coke adds, “ And so  
 “ it was resolved, in the reigne of Queen Eli-  
 “ zabeth, in the case of Sir Francis Drake, who  
 “ strook off the head of Downtie, *in partibus*  
 “ *transmarinis*, that his brother and heire might  
 “ have an appeal. Sed Regina noluit constituere  
 “ Constabularium Angliæ, &c. et ideo dormivit  
 “ appellum.”

“ dayes, and the lord will averr the contrary; it is said that  
 “ it shall be tryed by the certificate of the Marshall & the  
 “ King’s host in writing, under his seal, which shall be sent  
 “ to the justices.” *Conc upon Littleton, lib. 2. cap. 3. § 102.*

The latter part of the above sentence shews, that, in that particular period, there was no Constable of England; and the fact is, that this office, which, in early times, was hereditary in certain families, and descendible even to the husbands of females, had ceased to be so in the reign of Henry VIII. on the attainder of Edward Stafford Duke of Buckingham, executed for high treason in 1521; nor was there afterwards any permanent office of Constable in England; the King, from that time forward, only issuing his commission occasionally for the creation of a High Constable, for the particular purpose of judging in certain high crimes of state; and even this occasional appointment has, in the latter reigns, been superseded by the nomination of Lords High Stewards for the trial of state offences. The last commission of High Constable was issued by King Charles I. in 1631, upon an appeal of treason brought by Donald Lord Rae, a Scottish Baron, against David Ramsay, Esquire, for certain treasonable words and purposes of hostility towards the King and covenant, which, as no witnesses were present at the conversation when they were spoken, Ramsay positively denied, and offered to clear himself to the Court of Chivalry, either by combat, or as the court should appoint. The King's commission,

mission\*, after appointing Robert Earl of Lindsay to be High Constable, bears, that he, together with the Earl of Arundel, Marshal of England, shall “hear, decide, and bring to final sentence this cause, and do therein according to the law and custom of arms, and the usage of the *Military Court of England*.” These, with ten others of the officers of state and principal nobility, likewise commissioned by the King, formed the Court of Chivalry, and they began, by pronouncing a solemn judgment, declaring the crimes\* charged by the prosecutor against the prisoner to amount to high treason. The Earl Marshal then set forth, that the court were legally competent to decide this cause, like any other of his Majesty’s courts of justice, by the ordinary proof of witnesses; but that, seeing it appeared from the tenor of the accusation and defence, that this mode of proof was impossible, as the words were spoken in private conversation between the parties, no other issue remained for them but by way of public duel. The parties having thrown down their gloves in token of assent to this proposition, the High Constable put the appeal into one glove and the answer into the other, and folding them together,

Rushworth’s Coll. part 2. vol. 1. p. 112.



adjudged, in the name of the blessed Trinity, the said Lord Rae and David Ramsay to decide their difference by duel, on the 12th day of April 1631, between sun and sun, in Tuttlefields, Westminster, in the presence of the King. This duel, however, was not fought: the King, on more mature reflection, judging this mode of trial a remnant of barbarism, thought fit to recal his commission, and to bind the parties by their sureties to attempt nothing hostile against each other, or contrary to the public peace.

On the abolition of the Constable's hereditary jurisdiction, which, as we have observed, took place after the attainder of Stafford Duke of Buckingham, and the vacancy that ensued in that office, unless when there were occasional appointments by the King, it became a question, Whether the Marshal of England, (whose office still continued to be hereditary,) and who, it was allowed, had a joint jurisdiction with the Constable while the latter office existed, could exercise, during the vacancies of that office, the whole powers belonging to the Court of Chivalry. This question was much agitated, and received at different times opposite determinations: for in the reign of James I. the question being referred to the judgment of the Lord Keeper, the Master of the Rolls, and other Lords  
of

of the privy Council, they gave a solemn opinion, that the Earl Marshal had all the powers of judicature without the High Constable, during the vacancy of that office; and on report of this to the king, his Majesty issued his commission to Thomas Earl of Arundel, then hereditary Earl Marshal; which, after reciting that the Earl Marshal had delayed to proceed in some causes on account of doubts of his authority, contains the following strong declaration of his judicial power. “ We hold it, fit, says the King, “ in a case of so great weight, to proceed with “ extraordinary deliberation; and having now, “ both by ourself and the whole body of our “ council, received ample satisfaction, by many “ and clear proofs, that the Constable and Mar- “ shal were joint judges together, and severally “ in the vacancy of either, we do hereby autho- “ rise, will, and command you our Earl Mar- “ shal, that from henceforth you proceed in all “ causes whatsoever whereof the Court of Con- “ stable ought properly to take cognizance, as “ judicially and definitively as any Constable or “ Marshal of this realm, either jointly or sever- “ ally, heretofore have done.” Yet in the subsequent reign of Charles I. and within a few years from this deliberate and explicit recognition of the Marshal’s jurisdiction independent

of the Constable, the Lord Keeper and Judges of the King's Bench being consulted on a like occasion, viz. the before-mentioned appeal of treason by Lord Rae against Ramsay, gave a judgment directly contrary, and found, " that " the King must make a Constable, *durante bene placito*; for the Marshal could not take the " appeal without him."\* In such a state of uncertainty with respect to the judicial powers of the Constable and Marshal, it is no wonder that the jurisdiction of the Court of Arms or Chivalry, though never formally abolished, should have gone entirely into disuse: nor is this at all to be regretted; for its judicial powers in cases of treason are certainly much better lodged in those courts which determine according to the statutory laws of the realm, and through the medium of a jury, than in any anomalous jurisdiction not so regulated and restrained; and the trial of military crimes and delinquencies is reposed much more safely, and with greater security to the liberties of the subject, in those Courts-Martial, whose procedure includes all the benefits of the trial by jury, while it is regulated by laws which have all the publicity of the ordinary statutes of the realm.

\* Rushworth's Coll. part 2, page 107.

## No. III.

*Warrant for holding a General Court-Martial,  
for the Trial of Lord George Sackville.*

GEORGE R.

**W**HEREAS we were pleased, by our commission, dated on the 31st day of October 1758, to appoint George Sackville, Esq. commonly called Lord George Sackville, then a Lieutenant-General in our service, to be Commander in Chief of all our British forces, as well horse as foot, then serving on the Lower Rhine, in our army assembled or to be assembled there, under the command of our good Cousin Prince Ferdinand of Brunswick, Commander in Chief of our said army, enjoining and requiring him, the said Lord George Sackville, to obey such orders and directions as should be given him by the said Prince Ferdinand, or such other person as might hereafter be Commander in Chief of our said army, according to the Rules of War: **AND** WHEREAS we were pleased, by our instructions, under our sign-manual, bearing date the same 31st day of October 1758, to direct the said Lord George Sackville constantly to put in execution

execution such orders as he might receive from our said good Cousin Prince Ferdinand of Brunswick, or such other person as might hereafter be Commander in Chief of our said army, according to the Rules of War, with regard to marching, counter-marching, attacking the enemy, and all operations whatsoever to be undertaken by our said troops: AND WHEREAS we were informed that the said Lord George Sackville hath disobeyed the orders of the said Prince Ferdinand; which charge we thinking-fit should be enquired into by a General Court-Martial, did, by our warrant, bearing date the 20th day of January last, order that a General Court-Martial should be forthwith held upon that occasion, which was to consist of our trusty and well-beloved Richard Onslow, Lieutenant-General of our forces, whom we did appoint to be President thereof, and of our trusty and well-beloved Henry Pulteney, Sir Charles Howard, Knight of the Bath, John Huske, John Campbell, our right trusty and well-beloved Counsellor John Lord De Lawarr, our trusty and well-beloved James Cholmondeley, James Stuart, our right trusty and well-beloved Cousin William Earl of Panmure, our trusty and well-beloved William Kerr, commonly called Earl of Ancram, our right trusty and well-beloved Cousin William Earl

Earl of Harrington, our trusty and well-beloved James Abercromby, our right trusty and well-beloved Cousin George Earl of Albemarle, our trusty and well-beloved Francis Leighton, Lieutenant-Generals;—our trusty and well-beloved Edward Carr, our right trusty and well-beloved Cousin Thomas Earl of Effingham, our trusty and well-beloved Robert Rich, and William Belford, Major-Generals of our forces;—all of whom, or the said President, together with any twelve or more of the said officers, might constitute the said General Court-Martial; which said General Court-Martial hath met, but hath not yet examined any witnesses: AND WHEREAS it hath been since represented, that the said President, Lieutenant-General Richard Onslow hath been taken suddenly ill, and is unable to attend: AND WHEREAS, if others of the said members should by unavoidable accidents be prevented from attending, there may not be a sufficient number to compose a General Court-Martial, OUR WILL AND PLEASURE IS, and WE do hereby direct, that the General Court-Martial for the trial of the said Lord George Sackville do consist of our trusty and well-beloved Sir Charles Howard, Knight of the Bath, whom we do hereby appoint to be President thereof; and of our trusty and well-beloved John Huske, John Campbell, our right

right trusty and well-beloved Counsellor John Lord De Lawarr, our trusty and well-beloved James Cholmondeley, James Stuart, our right trusty and well-beloved Cousin William Earl of Panmure, our trusty and well-beloved William Kerr, commonly called Earl of Ancram, our right trusty and well-beloved Cousin William Earl of Harrington, our trusty and well-beloved James Abercromby, our right trusty and well-beloved Cousin George Earl of Albemarle, our trusty and well-beloved Francis Leighton, Robert Manners, Esq; commonly called Lord Robert Manners, Lieutenant-Generals;—our trusty and well-beloved Edward Carr, our right trusty and well-beloved Cousin Thomas Earl of Effingham, our trusty and well-beloved Robert Bertie, Esq; commonly called Lord Robert Bertie, and Julius Caesar, Major-Generals of our forces;—all of whom, or the said Lieutenant-General Sir Charles Howard President, together with any twelve or more of the said last mentioned officers, may constitute the said General Court-Martial: AND you are to order the Provost-Marshal General, or his Deputy, to give notice to the said President and officers, and all others whom it may concern, when and where the said Court-Martial, hereby appointed, is to be held, and to summon such witnesses as shall be

be able to give testimony in this matter; the said Provost-Marshal General, and his Deputy, being hereby directed to obey your orders, and give attendance where it shall be requisite. **AND WE** do further authorise and empower, the said Court-Martial, hereby appointed, to hear and examine all such matters and informations as shall be brought before them, touching the charge aforesaid, and proceed in the trial of the said Lord George Sackville, and in giving of sentence, according to the rules of military discipline; which said sentence you are to return to our Secretary at War, to be laid before us for our consideration: **AND** for so doing this shall be, as well to you, as to the said Court-Martial hereby appointed, and all others concerned, a sufficient warrant.

Given at our Court at St. James's, this 6th day of March 1760, in the 33d year of our reign.

*By his Majesty's command,*

**HOLDERNESSE.**

*To Our Trusty and Well-beloved  
Thomas Morgan, Esq; Judge-  
Advocate-General of Our Forces,  
or his Deputy.*





ant to an Act of parliament now in force, entitled, “ An act for punishing mutiny and desertion, and for the better payment of the army and their quarters.” And for so doing, this order shall be, unto you, and all concerned, a sufficient warrant and authority.

Given at Edinburgh, this      day of  
1797,

A. G. General.

By his Lordship's command,  
A. M. D. Adj. General.

*Major-General A. C.*

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No. V.

*Warrant for holding a Court of Enquiry,  
issued by his late Majesty George II. in 1757.*

GEORGE R.

**W**HEREAS We were pleased in August last to send a number of our troops on an expedition against France, with orders and instructions to attempt, as far as should be found practicable, a descent upon the French coast,  
at

at or near Rochefort, in order to attack, if practicable, and by a vigorous impression force that place; and to burn and destroy, to the utmost of their power, all docks, magazines or arsenals, and shipping, that should be found there, and to exert such other efforts as should be judged most proper for annoying the enemy, as by our several instructions to the commander of the said forces does more fully appear: *And whereas* the troops sent for these purposes have returned to Great Britain, no attempt having been made to land on the coast of France; concerning the cause of which failure we think it necessary that enquiry should be made, by the General Officers hereafter mentioned, in order that they may report those causes to us, for our better information: *Our will and pleasure* therefore is, and we do hereby nominate and appoint our right\* trusty and right entirely beloved Cousin and Counsellor Charles Duke of Marlborough, Lieutenant-General; and our trusty and well-beloved George Sackville, commonly called Lord George Sackville, and John Waldegrave, Major-Generals of our forces, to examine and enquire touching the matters aforesaid: *And* you are to give notice to the said General officers, when and where they are to meet for the said examination: *And* the said General Officers

Officers are hereby directed to cause you to summon such persons, (whether the Generals or other officers employed on the expedition, or others), as are necessary to give information touching the said matters, or as shall be desired by those who were employed on the expedition : And the said General Officers are hereby further directed to hear such persons as shall give them information touching the same ; and they are authorised, empowered, and required, strictly to examine into the matters before mentioned, and to report a state thereof, as it shall appear to them, together with their opinion thereon. All which you are to transmit to our Secretary at War, to be by him laid before us, for our consideration ; and for so doing, this shall be, as well to you, as to our said General Officers, and all others concerned, a sufficient warrant.

Given at our Court at Kensington, this 1st day of November 1757, in the 31st year of our reign.

BARRINGTON.

*To our Trusty and Well-beloved  
Thomas Morgan, Esq; Judge-  
Advocate General of our Forces,  
or his Deputy.*

## No. VI.

*Statute passed in Ireland, anno 1798, for the Enactment of Martial Law, entitled, "An Act for the Suppression of the Rebellion which still unhappily exists within this Kingdom, (Ireland,) and for the protection of the Persons and Properties of his Majesty's faithful Subjects within the same."*

**W**HEREAS a traitorous conspiracy, for the subversion of the authority of his Majesty and the Parliament, and for the destruction of the established constitution and government, hath unfortunately existed within this kingdom for a considerable time, and hath broken out in acts of the most daring and open rebellion :

And whereas his Excellency Earl Camden, then Lord Lieutenant General and General Governor of Ireland, did on the 30th of March 1798, by and with the advice of the Privy Council of this kingdom, issue his most direct and positive orders to the officers commanding his Majesty's forces, to employ them with the utmost vigour and decision for the immediate suppression

suppression of the said rebellion, and did by his proclamation of the same date, by and with the advice of the Privy Council, notify the same :

And whereas notwithstanding the said orders, so issued as aforesaid, the said rebellion did very considerably extend itself, insomuch that large bodies of armed traitors did openly array themselves, and make the most daring and violent attacks upon his Majesty's forces, and committed the most horrid excesses and cruelties on the properties and persons of his Majesty's loyal subjects ;

And whereas, for the more effectual suppression of the said daring and unprovoked rebellion, his Excellency the said Earl Camden did on the 24th of May 1798, by and with the advice of the Privy Council, issue his orders to all general officers commanding his Majesty's forces, to punish all persons acting, aiding, or in any manner assisting in the said rebellion, according to Martial law, either by death or otherwise, as to them should seem expedient, for the punishment and suppression of all rebels in their several districts, and did by his proclamation of the same date, by and with the advice of the Privy Council, notify the same :

And whereas his Excellency the said Earl Camden did, by message, duly communicate his said orders and proclamations, notifying the same respectively to the Lords Spiritual and Temporal and Commons then in Parliament assembled, who did, by their addresses to his Excellency, express their cordial acknowledgments for his said messages, and their entire approbation of the decisive measures so taken by his Excellency, by and with the advice of the Privy Council, however deeply they lamented the necessity by which they were dictated ; and the said Lords Spiritual and Temporal and Commons did, by their addresses, pledge their full engagement of support of every measure of firmness and vigour which might be necessary for the speedy and effectual suppression of the said rebellion :

And whereas by the wise and salutary exercise of his Majesty's undoubted prerogative in executing Martial law for defeating and dispersing such armed and rebellious force, and in bringing divers rebels and traitors to punishment in the most speedy and summary manner, the peace of this kingdom has been so far restored, as to permit the course of the common law partially to take place, but the said rebellion still continues to rage in very considerable parts of this kingdom,

kingdom, and to desolate and lay waste the country by the most savage and wanton violence, excess, and outrage, and has utterly set at defiance the civil power, and stopped the ordinary course of justice and of the common law therein :

And whereas many persons who have been guilty of the most daring and horrid acts of cruelty and outrage in furtherance and prosecution of the said rebellion, and who have been taken by his Majesty's forces employed for the suppression of the same, have availed themselves of such partial restoration of the ordinary course of the common law to evade the punishment of their crimes, whereby it has become necessary for Parliament to interpose :

Be it therefore enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, That, from and after the passing of this act, it shall and may be lawful to and for the Lord Lieutenant or other Chief Governor or Governors of this kingdom, from time to time during the continuance of the said rebellion, whether the ordinary courts of justice shall or shall not at such time be open, to issue his or their orders



to all officers commanding his Majesty's forces, and to all others whom he or they shall think fit to authorise in that behalf, to take the most vigorous and effectual measures for suppressing the said rebellion in any part of this kingdom, which shall appear to be necessary for the public safety, and for the safety and protection of the persons and properties of his Majesty's peaceable and loyal subjects, and to punish all persons acting, aiding, or in any manner assisting in the said rebellion, or maliciously attacking or injuring the persons or properties of his Majesty's loyal subjects in furtherance of the same, according to Martial law, either by death or otherwise, as to them shall seem expedient, for the punishment and suppression of all rebels in their several districts, and to arrest and detain in custody all persons engaged in such rebellion or suspected thereof, and to cause all persons so arrested and detained in custody to be brought to trial in a summary manner by Courts-Martial, to be assembled under such authority, and to be constituted in such manner and of such description of persons, as the said Lord Lieutenant or other Chief Governor or Governors shall from time to time direct, for all offences committed in furtherance of the said rebellion, whether such persons shall have been taken in open arms

arms against his Majesty, or shall have been otherwise concerned in the said rebellion, or in aiding or any manner assisting the same, and to execute the sentences of all such Courts-Martial, whether of death or otherwise, and to do all other acts necessary for such several purposes.

And be it enacted, That no act which shall be done in pursuance of any order which shall be so issued as aforesaid, shall be questioned in his Majesty's Court of King's Bench or in any other court of the common law. And in order to prevent any doubt which might arise, whether any act alleged to have been done in conformity to any orders so to be issued as aforesaid was so done, it shall and may be lawful to and for the said Lord Lieutenant or other Chief Governor or Governors, to declare such acts to have been done in conformity to such orders; and such declaration, signified by any writing under the hand of such Lord Lieutenant or other Chief Governor or Governors, shall be a sufficient discharge and indemnity to all persons concerned in any such acts, and shall in all cases be conclusive evidence that such acts were done in conformity to such orders.

And be it further enacted, That all officers, non-commissioned officers, and soldiers, who

shall act under any such orders as aforesaid, shall be responsible for all things which shall be done under such orders to such Courts-Martial only by which they shall be liable to be tried for any offence against the Articles of War, under any act then in force for such purposes; and such Courts-Martial shall have full and exclusive cognizance of all matters and things which shall be objected against such officers, non-commissioned officers, and soldiers respectively, and all proceedings shall be had thereon, in the same manner as for offences against the Articles of War, and not otherwise; and the Court of King's Bench, or any other court of justice, civil or criminal, shall not take cognizance of any act, matter or thing which shall be done by any such officer, non-commissioned officer, or soldier, in pursuance of this Act; and if any proceeding shall be had in any such court against any such officer, non-commissioned officer, or soldier, for any such act, matter, or thing, by indictment, action, or otherwise, all such proceedings shall be stayed by summary order, on application to the court wherein they shall be had.

And be it enacted, That if any person who shall be detained in custody under the powers created by this act shall sue forth a writ of Habeas corpus, it shall be good and sufficient return

to

to such writ, that the party suing forth the same is detained by virtue of a warrant under the hand and seal of some officer or other person duly authorised by the Chief Governor or Chief Governors for the time being to issue such warrant under the authority of this act.

Provided nevertheless, That the name of such officer or other person so authorised as aforesaid to issue such warrant, shall have been previously notified by the Chief Governor or Governors, or his or their Chief Secretary, to the Court of King's Bench, by writing, signed by the said Chief Governor or Chief Governors, or his or their Chief Secretary, and signifying to the said court that such person or persons was or were so authorised as aforesaid to exercise the powers specified by this act; and when such return shall be made, it shall not be necessary to bring up the body of the person who is so detained.

Provided always, and be it declared and enacted, That nothing in this act contained shall be construed to take away, abridge, or diminish the acknowledged prerogative of his Majesty for the public safety to resort to the exercise of Martial law against open enemies or traitors, or any powers by law vested in the said Lord Lieutenant or Chief Governor or Governors of this Kingdom, with or without the advice of his Majesty's Privy

Privy Council, or of any other person or persons whomsoever, to suppress treason and rebellion, and to do any act warranted by law for that purpose, in the same manner as if this act had never been made, or in any manner to call in question any acts heretofore done for the like purposes.

And be it enacted, That this act shall continue and be of force until the first day of the next session of Parliament, and for two months after the said day, and no longer: And that it shall and may be lawful to repeat, amend, or alter this act during this session of Parliament.

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# P R E F A C E

TO THE

*F I R S T E D I T I O N.*

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THE following Treatise is the joint result of the Author's reading, and enquiry into every source of information, relative to the Military Law of this country, and of his professional experience in the Forms and Practice of General Courts-Martial, during a period of several years, in which he had the honour of holding his Majesty's commission of Judge-Advocate for the northern part of this United Kingdom. In these latter years, in which, from the peculiar circumstances of the times, Britain, under the regulation of a severe but necessary policy, has become an armed nation, the Military Law has obtained a

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more

more extensive field of operation than at any former period of the national annals. At no time, therefore, was it ever so necessary that its doctrines should be fully understood, and the knowledge of its regulations generally diffused, as when daily occasion requires their application and enforcement.

In the composition of this Treatise, the Author endeavoured to supply a want, which he felt himself, and which he believes will be acknowledged by all who have been desirous of obtaining a thorough acquaintance with the subject; namely, that the Military Law has never been systematically treated, or with any reference of its doctrines to the general principles either of Civil Jurisprudence or of the Law of Nations. We have hitherto had nothing written expressly upon the subject by any professional Lawyer; and in the short incidental account which is given of the *Military State* by Sir William Blackstone, we have to regret that he has  
drawn

drawn his notions of the Martial Law from what it was in the days of Hale and Coke; and with an inadvertency, scarcely excusable in a writer who has so profoundly studied the constitution as well as the jurisprudence of his country, applied these notions to the Military Law as it exists at present. It became, therefore, an object of some importance, to correct this palpable misrepresentation, and to exhibit the Military Law as it truly is, a part of the laws of the land, enacted by the same authority, enforced by the same power, and resting on the same foundation of justice, good policy, and humanity. The historical deduction in the beginning of this Treatise is principally directed to the removal of these prejudices; as, by a regular detail of the progress of the Military Law in the various periods of our history, it is seen to keep pace with the constitution, to have partaken in all its alternate changes, and to have attained at length the same character of a system wisely calculated to secure alike the rights, and to enforce the duties of the subject.

The practical part of this work is particularly addressed to the Gentlemen of the Military profession; to whom it is of importance to be well acquainted not only with the forms and procedure in the trial of crimes by Court-Martial, but with the general doctrines of the law of evidence, which apply equally to the cognizance of crimes before a Military, as before a Civil tribunal. In any matters regarding the practice of the Military Courts which appeared to the Author doubtful, he availed himself of the knowledge of those who were best qualified to resolve his doubts: And it would be a failure in justice as well as in gratitude, not to acknowledge the useful information which was readily and politely furnished him, by Sir Charles Morgan, Judge-Advocate General, on all points on which he had occasion to consult him.

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# ADVERTISEMENT

TO THE

## SECOND EDITION.

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N. B. THE references made in this Work to the Mutiny-act were adapted to the latest act which had passed previous to the publication of the first edition, viz. that of 1799. As additional Sections have been inserted in the Mutiny-acts passed since that time, and others may be inserted from time to time, the references may often be found not corresponding to these latter acts in the numeration of the Sections. But there will be little difficulty in finding out the Section referred to, from the marginal titles of the Sections; and it would have been a needless attempt to correct an error, when the correction might have availed, perhaps, only for a single year.









